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No. 478

In the
United States Court of Appeals
For the Seventh Circuit

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellant,
No. 11933 vs.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellee.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,
No. 11934 vs.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
J. Sam Perry,
District Judge.

JOINT APPENDIX.

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INDEX

	PAGE
Statement pursuant to Rule 12c, U.S.C.A.	1
Complaint, filed November 10, 1954	2
Answer of Continental Illinois National Bank and Trust Company of Chicago, filed December 2, 1954	7
Stipulation	10
Exhibit A—Agreement	19
Exhibit B—Contracts Purchased—form	31
Exhibit C—Deposit Slip—form	32
Transcript of Proceedings, November 21, 1955	33
Opening statement on behalf of plaintiff by Mr. Bishop	33
Opening statement on behalf of defendant by Mr. Mayer	54
Colloquy	124-132
Memorandum of the Court, filed June 20, 1956	163
Findings of Fact and Conclusions of Law, dated September 7, 1956	164
Judgment entered September 7, 1956	170
Findings of Fact and Conclusions of Law, submitted by plaintiff, filed September 7, 1956	204
Objections to Findings of Fact and Conclusions of Law	171
Notice of Appeal, filed October 4, 1956	172
Certificate of mailing of notice of appeal	173
Notice of Cross Appeal, filed October 8, 1956	174
Certificate of mailing of notice of cross appeal	175

PAGE.

Excerpts from Federal Register:
November 14, 1950 175
December 6, 1950 179
February 20, 1954 184
March 27, 1954 193

WITNESSES.

For Plaintiff:

A. E. Anderson—
Direct Examination by Mr. Bishop 63
Cross Examination by Mr. Mayer 89
Redirect Examination by Mr. Bishop 92
Recross Examination by Mr. Mayer 93
(recalled)
Redirect Examination by Mr. Bishop 105, 108
Recross Examination by Mr. Mayer 105

Harry R. McHenry—
Direct Examination by Mr. Bishop 93
Cross Examination by Mr. Mayer 101
Redirect Examination by Mr. Bishop 102, 103
Recross Examination by Mr. Mayer 103

For Defendant:

Fred Remmert—
Direct Examination by Mr. Mayer 110

Frederick A. Curtis—
Direct Examination by Mr. Mayer 112
Cross Examination by Mr. Bishop 118

PAGE

EXHIBITS.

Plaintiff's:

No. 1—General Statement (excerpts) 133

No. 2—General Statement (excerpts) 136

No. 3—Instructions to all Insured Banks concerning the Maintenance of Assessment Records and the Preparation of Certified Statements 143

No. 4—Letter, dated August 2, 1937, to Continental Illinois National Bank & Trust Co., from W. G. Loeffler, Fiscal Agent 147

No. 5—Letter, dated September 9, 1937, to Federal Deposit Insurance Corporation, from Frank L. King, Comptroller 148

No. 6—Office Time Schedule 151

Nos. 7-11—Bank Statements 155-159

Defendant's:

No. 1—Instructions Regarding the Reporting of Reciprocal Interbank Balances in Call Reports of Condition (Form 2130) 161

No. 2—Change in Manner of Preparing Reports of Deposits for Reserve Computation Purposes with Respect to Reciprocal Interbank Balances 162

1

IN THE UNITED STATES DISTRICT COURT

(Caption—Civil Action No. 54 C 1667)

PREFIX TO RECORD

Pursuant to Rule 12c of the United States Court of Appeals for the Seventh Circuit the following constitutes the prefix to the record:

1. Commencement of suit: November 10, 1954.

2. Names of parties:—Federal Deposit Insurance Corporation is the Plaintiff. Continental Illinois National Bank And Trust Company Of Chicago is the Defendant.

3. Dates of pleadings:—Complaint filed November 10, 1954. Answer filed December 2, 1954.

No property was attached.

2 Trial and arguments:—Trial had on November 21, 1955 before Judge J. Sam Perry without a jury. No question referred to a commissioner, master, or referee.

5. Date of decree entry:—Judgment entered on September 7, 1956.

6. Date of Appeal:—The Plaintiff filed notice of appeal on October 4, 1956 and the Defendant filed notice of cross-appeal on October 8, 1956.

/s/ John H. Bishop
Attorney for Federal Deposit Insurance Corporation, Plaintiff.

/s/ Frank D. Mayer
/s/ Louis A. Kohn
Attorneys for Continental Illinois National Bank And Trust Company Of Chicago, Defendant

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff,
vs.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant.
54 C 1667

COMPLAINT

(Filed Nov. 10, 1954)

Comes now the Federal Deposit Insurance Corporation, the plaintiff herein, and alleges:

1. The plaintiff, Federal Deposit Insurance Corporation, (hereinafter sometimes referred to as the "Corporation") is a corporation duly organized and existing under and by virtue of an Act of the Congress of the United States (Act of June 16, 1933 48, Stat. 168, as amended by the Act of August 23, 1935, 49 Stat. 684, U.S.C., Title 12, Sec. 264, as amended by the Act of September 21, 1950, 64 Stat. 873, U.S.C., Title 12, Sec. 1811, designated as the Federal Deposit Insurance Act) with its principal place of business in the City of Washington, District of Columbia.

2. The jurisdiction of this court arises under Title 12, U.S.C., Sec. 1819 (Fourth) which provides that all
5 suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States. The amount in controversy exclusive of interest and costs exceeds the sum of Three Thousand ($3,000.00) Dollars.

3. Continental Illinois National Bank and Trust Company of Chicago is a duly chartered and organized na-

tional banking association with its principal place of business in Chicago, Cook County, Illinois, and was at all times pertinent herein an insured bank and a national member bank as defined by Title 12, U.S.C. Sec. 1813.

4. This action arises under a law of the United States, the Banking Act of 1933 (48 Stat. 168; U.S.C., Title 12 264 §264), as amended by the Banking Act of 1935 (49 Stat. 684; U.S.C., Title 12, §264), and as further amended by the Federal Deposit Insurance Act of 1950 (64 Stat. 873; U.S.C., Title 12, §§ 1811-1831) (All hereinafter referred to as "The Act").

5. This is an action for a declaration of rights and for such further necessary or proper relief as may be granted pursuant to the provisions of the Federal Declaratory Judgment Act of June 25, 1948 (62 Stat. 964; U.S.C., Title 28, §§ 2201-2202), and The Act. An actual controversy exists between the plaintiff and the defendant with respect to the matters herein alleged, and the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars.

6. This action calls into question the determination of the defendant's assessment base under The Act for the period July 1, 1948 to date.

6 7. The Act provides that each insured bank (a) shall file with the plaintiff semi-annually, on or before July 15 and January 15 of each year, certified statements on forms prescribed by the plaintiff showing for the six (6) months period ending on the preceding June 30, and December 31, respectively, the amount of the assessment base and the amount of the semiannual assessment due to the plaintiff; and (b) shall pay to the plaintiff the amount of the semiannual assessment which it is required to certify. Such payments, under The Act and plaintiff's regulations (12 C.F.R. 327.4, as amended at 15 F.R. 8639, and 327.3, as amended at 19 F.R. 1665) are

required to be made at the time of the filing of the certified statement.

8. The Act further provides (a) that the assessment rate shall be one-twelfth (1/12) of one (1%) per cent per annum, and that the semiannual assessment shall be the amount of the product of one-half (½) of the annual assessment rate multiplied by the assessment base; and (b) that the assessment base, for each semi-annual period, shall be the average of the bank's liability for deposits, as the term "deposit" is defined in The Act and in the plaintiff's regulations (12 C.F.R. and Supp. Ch. III).

9. Pursuant to and in compliance with The Act the Board of Directors of the Corporation has from time to time adopted rules and regulations pertaining to the filing of Certified Statements and to reporting collection and payment of assessments (12 C.F.R. Parts 304, 327, as amended at 15 F.R. 8630-8632, 8638-8639 and at 19 F.R. 1663-1665).

7 In addition thereto the Corporation has from time to time made administrative decisions and determinations in reference to other assessment matters which decisions and determinations have been uniformly applied in the administration of the authority vested in the Corporation by The Act and reference hereto to the rules and regulations shall include such decisions and determinations.

10. From and in each semiannual assessment period, beginning July 1, 1948, and continuing to date, the defendant has failed to include in the assessment base computed in its semiannual Certified Statements filed with plaintiff various "deposits" within the terms of The Act and the rules and regulations of the Corporation and it has deducted from gross deposits various sums which are not eligible for such deduction under The Act and regulations. As a consequence thereof the assessment base

reported by defendant in each of the semiannual Certified Statements has been improperly reduced. Said exclusions and deductions include, but are not limited to, the following:

a. Deposit balances due to other banks with which reciprocal bank relationships are maintained, have not been included in the assessment base for the periods prior to July 1, 1950.

b. Deposit balances arising from the purchase by the defendant of evidences of indebtedness from its customers which deposit balances are held for the account of the respective customers and as security for indebtedness due to the defendant, have not been included in the assessment base for the periods prior to July 1, 1950.

c. Funds received from employees of the defendant and sums deducted from salaries due to employees of the defendant which have been held by the defend-
8 ant for the special purposes of paying various taxes, or for the purchase of certain securities, insurance or other purposes, have not been included in the assessment base.

d. Cash items received by the defendant prior to the assessment base day which were forwarded by the defendant for collection prior to the base day were erroneously deducted from reported deposits.

e. Cash items which were received by the defendant prior to the assessment base day which were forwarded by the defendant for collection on the base day were erroneously deducted from reported deposits.

f. Cash items which were received on an assessment base day which were forwarded by the defendant for collection subsequent to the base day were erroneously deducted from reported deposits.

g. Checks and drafts received in payment for cash items were erroneously deducted from reported deposits.

h. Items held to be charged or returned to customers by the defendant were erroneously deducted as cash items.

i. Items which had in fact been collected were erroneously deducted as cash items in the process of collection.

j. Deductions were made for purported cash items which in fact did not constitute deductible cash items.

11. As a result of the defendant's failure to include in its assessment base all deposits required to be included and defendant's action in deducting from gross deposits various sums which were not eligible for such deduction, the defendant has not filed complete and proper Certified Statements for each of the assessment base periods in controversy as required by law and rules and regulations of the Corporation for determining the amount of assessment payable by the defendant to the plaintiff, and the defendant has not paid plaintiff the full amount of assessments due for any of the said assessment periods.

12. On information and belief, the plaintiff alleges that the total amount due and unpaid to the plaintiff from the defendant on account of assessments for such periods is in excess of the sum of One Hundred Seventy-seven Thousand Four Hundred Forty-eight Dollars and Forty-six ($177,448.46) Cents. Demand has been made by the plaintiff on the defendant for the payment to it of said sum, but defendant refuses and continues to refuse to pay same or any portion thereof.

Wherefore, the plaintiff prays that this Honorable Court declare, adjudge, and decree:

1. That the defendant, its officers and agents, be required to file revised Certified Statements correctly showing the deposit liabilities for assessment purposes for each of the semiannual base periods for which incorrect Certified Statements have been filed heretofore as alleged in this complaint.

2. That the plaintiff have judgment against the defendant for the amount of the assessment found to be due from the defendant to the plaintiff upon such revised Certified Statements with legal interest and costs.

3. That the plaintiff have such further, other and additional relief as may appear meet and proper to this Honorable Court.

/s/ John H. Bishop
/s/ William M. Doherty
Attorneys for Plaintiff

Of Counsel:
Royal L. Coburn
Goodwin J. Oppegard

10

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 54 C 1667) * *

ANSWER OF CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

(Filed Dec. 2, 1954)

Now comes Continental Illinois National Bank And Trust Company Of Chicago and for answer to the complaint says:

1. It admits the allegations of paragraphs 1 to 8, both inclusive.

2. As to the allegations of paragraph numbered 9 of the complaint, this defendant says that prior to the promulgation of the regulations of Federal Deposit In-

surance Corporation, which became effective March 1, 1954, there were no regulations defining or interpreting the term "base day", nor were there any regulations with respect to the other matters in controversy herein; that the regulations then issued are interpretive regulations and, therefore, are retrospective as well as prospective.

3. As to the allegations of paragraph numbered 10 of the complaint, this defendant says:

(a) Defendant has included in the assessment base for the periods prior to July 1, 1950 net deposit balances due to other banks with which reciprocal bank relation-
11 ships are maintained, and that the said method of reporting balances is that which has been authorized and directed by both the Comptroller of the Currency and the Federal Reserve Bank of Chicago for many years.

(b) That the alleged deposit balances arising from the purchase by this defendant of evidences of indebtedness are not actual deposits but are in the nature of reserves or collateral to secure the obligations of the customers from whom such evidence of indebtedness are purchased.

(c) That the funds received from employees of the defendant and sums deducted from salaries due to employees of defendant are not actual deposits but are carried as accounts payable and not as deposit balances.

(d) That the cash items received by the defendant prior to the assessment base day and forwarded for collection prior to the base day are not actually recorded in the books of defendant as deposits until the base day, and have at times been forwarded by defendant subsequent to the close of business of the preceding business day; that, accordingly, under a fair interpretation of the statutes pertaining thereto and under the express interpretation of the present regulations promulgated by Federal Deposit Insurance Corporation, defendant should be permitted to deduct the items so forwarded for collection.

(e) The items alleged to have been received prior to the assessment base day and forwarded for collection on said day are items which were not recorded on the books of the defendant until the base day and, therefore, have been properly deducted by defendant.

(f) Items received on the assessment base day forwarded by defendant for collection subsequent to the base day are items which, because of the volume of defendant's business, could not be forwarded on the base day but are under the express regulations presently in force, and under a fair and proper interpretation of the statute properly deducted by defendant.

(g) As to checks and drafts received in payment for cash items alleged to have been erroneously deducted, defendant is informed and believes that items aggregating approximately $1,100 have been erroneously deducted.

(h) Items which are held to be charged or returned to customers by defendant are not true deposits and, therefore, should not be included for purposes of this assessment.

(i) This defendant has no knowledge as to the amount of the items alleged to have been collected and erroneously deducted as cash items and, if any such items exist, defendant is ready and willing to pay the assessment based upon the same.

(j) The allegations in subparagraph (j) of paragraph 10 are so vague that this defendant is unable to answer the same.

Wherefore, defendant prays that this suit be dismissed at the cost of plaintiff.

/s/ Herbert A. Friedlich
/s/ Frank D. Mayer
/s/ Leo F. Tierney
/s/ Frances W. Collopy
Attorneys for Defendant

/s/ Mayer, Meyer, Austrian & Platt
Mayer, Meyer, Austrian & Platt
231 South LaSalle Street
Chicago 4, Illinois
Of Counsel

14

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 54 C 1567) • •

STIPULATION

The parties to the above entitled action, by and through their respective attorneys of record, hereby stipulate and agree, for the purpose of this action only, that the facts hereinafter in this stipulation set forth may be considered to be true.

It Is Further Stipulated, that by this stipulation or by offering this stipulation in evidence at the trial herein, neither party hereto shall be taken as stipulating or agreeing to the relevancy or materiality herein of any 15 of the facts so stipulated, nor shall either party be precluded from contending in any of the proceedings in this cause hereafter, in any court, in their briefs or otherwise, that any of such facts are not relevant or material to any of the issues herein; and objections to the relevancy or materiality of any portion of this stipulation are not and shall not be waived by the failure of either party to make such objections at the time this stipulation is offered in evidence.

1. The plaintiff, Federal Deposit Insurance Corporation (hereafter referred to as the "FDIC") is a corporation duly organized and existing under and by virtue of an Act of Congress of the United States (Act of June 16, 1933, 48 Stat. 168, as amended by the Act of August 23, 1935, 49 Stat. 684, U.S.C., Title 12, Sec. 264, as amended by the Act of September 21, 1950, 64 Stat. 873,

U.S.C., Title 12, Sec. 1811, designated as the Federal Deposit Insurance Act) with its principal place of business in the City of Washington, District of Columbia.

2. The defendant, Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as "Continental") is a duly chartered and organized national banking association with its principal place of business in the City of Chicago, County of Cook and State of Illinois, and was at all times pertinent herein an insured bank and a national member bank as defined by Title 12, U.S.C., Sec. 1813.

3. Continental is, and at all times herein pertinent, has been subject to the Banking Act of 1933 (48 Stat. 168; U.S.C., Title 12, §264), as amended by the Banking Act of 1935 (49 Stat. 684; U.S.C., Title 12, §264), and as further amended by the Federal Deposit Insurance Act of 1950 (64 Stat. 873; U.S.C., Title 12 §§1811-1831, hereinafter sometimes referred to as the "Act").

4. For the period from July 1, 1948 through and including September 20, 1950 (i.e., prior to the effective date of said 1950 amendment), Continental tabulated deposits daily and computed an average of those deposits for each six months ending June 30 and December 31. From the daily amount of such deposits, Continental daily deducted the amount of items in process of collection provided such items were included in deposits as defined in the Banking Act of 1935. In order to determine which items were so included in deposits, it was necessary for Continental to examine all checks handled each day. The net daily average of such deposit liabilities for a six (6) months period was its assessment base for a semi-annual period.

The said amendment of September 21, 1950 had the effect, among other things, of reducing the amount of

work required of Continental in order to compute its
17 assessment base. The said amendment did not require the aforementioned daily tabulation of deposits but instead designated four days (March 31, June 30, September 30 and December 31) as assessment base days, each semi-annual assessment being computed on the average deposits of the two base days in the semi-annual period.

In determining its assessment bases under the said amendment of 1950 Continental chose the first of two alternative methods prescribed by the Act for the deduction of cash items, namely the "aa" method.

Continental semi-annually on or before July 15 and January 15 of each year prepared and filed with FDIC certified statements on forms prescribed by the FDIC showing for the six months period ending on the preceding June 30 and December 31, respectively, the amount of its assessment base and the amount of semi-annual assessment computed by Continental as due to FDIC for the following six months period, and, at the time of filing said statements, paid to the FDIC the amount of semi-annual assessments shown by said statements to be due.

5. In an audit made in the latter part of 1953 by the FDIC's auditors of the said certified statements prepared and filed by Continental for the period of July 1, 1948 through June 30, 1953, exceptions were taken by
the FDIC's auditors to certain exclusions and deduc-
18 tions from the assessment bases used by Continental in computing amounts due to the FDIC under the applicable statutes.

6. The following described items listed in the same order as in paragraph 10 of the Complaint herein were excluded or deducted by Continental from its assessment base during the period covered by the Complaint herein, which exclusions and deductions FDIC has refused to accept.

(a) *Reciprocal Bank Balances*

During the period covered by the complaint Continental maintained reciprocal bank accounts with about twenty-six large banks in nine principal cities throughout the country. Such reciprocal accounts existed when Continental has a deposit balance due to another insured bank and a deposit balance due from the same insured bank.

In its certified statements for the period July 1, 1948 through June 30, 1950, during which period the statute as amended August 23, 1935 was in effect, Continental excluded from its assessment bases the amount of deposit balances due to other banks with which reciprocal bank accounts were maintained. Such exclusions were limited to amounts not in excess of the balances due from each of such banks. The following illustration will indicate the method Continental followed in handling reciprocal bank balances in computing its assessment base. If
19 bank "A" had a deposit account in Continental of $250.00 and Continental had a deposit balance in bank "A" of $100.00, Continental would include only the difference in its deposit liabilities for assessment purposes, namely $150.00. If the conditions were reversed and bank "A" had a deposit balance in Continental of $125.00 and Continental had a deposit balance in bank "A" of $300.00 Continental would not include any of the deposit due to bank "A" in its deposit liabilities for assessment purposes.

Continental's books during the period involved reflected the amount due to and due from each insured bank and the net position of Continental's deposit liabilities as well as the net position of Continental's asset account "due from other banks". The certified statements above referred to filed by Continental reflected the same net position of deposit liabilities as shown by Continental's books. This accounting treatment has been employed by Conti-

nental from about 1935 to date. The claimed underpayment is $24,755.42.

(b) *"Contract Reserve" Balances*

In computing its assessment bases for the period from July 1, 1948 to June 30, 1950, during which time the Act as amended August 23, 1935 was in effect, Continental excluded from its assessment bases "reserve balances" arising from purchases by Continental of evidences of indebtedness (hereinafter sometimes called "sales contracts") from its customers selling retail merchandise on credit. These "reserve balances" arose from Continental's purchases of sales contracts from one of its customers, (hereinafter sometimes referred to as the "Customer") under a contract dated May 23, 1944, which contract is attached hereto, marked Exhibit "A" and by this reference made a part hereof. At the time Continental purchased the said sales contracts, it remitted to the Customer a sum equal to 90% of the amounts then owing under the said sales contracts by the merchandise buyer less the agreed "cash discount", usually ⅛ of 1%, and the remaining 10% of the purchase price was credited by Continental to an account set up on Continental's books, and designated as the Customer's "Contract Reserve". The customer as agent for Continental then proceeded to make collections on the sales contracts and periodically at the end of each accounting period (13 in number and four weeks in duration) made a report to Continental showing the results of these collections during such accounting period, a copy of the form of such report is attached hereto marked Exhibit "B" and by this reference made a part hereof.

The aforementioned "Contract Reserve" account was carried as a liability on Continental's books. The claimed underpayment of assessment in this respect is $2,442.52.

(c) *Payroll Deductions and Withholding Taxes*

In its certified statements for the period July 1, 1948 through June 30, 1953, Continental excluded from its assessment bases sums deducted from salaries due to employees of the Bank which were held by Continental for the following purposes: (1) payment of federal income taxes on employees' salaries; (2) payment of employees' contributions to group life insurance premiums; and (4) purchase of government securities for employees.

In accordance with applicable Income Tax regulations, the funds described in classes (1) and (2) above, i.e., income and social security taxes were withheld by Continental as employer from its employees during one month and were paid to Continental as a depository bank during the succeeding month, and as depository bank, Continental gave itself as employer a receipt as evidence of the payment of income and social security taxes. Continental as depository bank then gave deposit credit to the Federal Government in an account entitled "Treasury Tax and Loan Account". From the time the funds were withheld until deposited in the depository bank, Continental's books showed the items as accounts payable. The claimed underpayment in this respect is $505.00.

The funds in class (3) above consisted of deductions withheld at the employee's written request from each employee's salary, which deductions were accumulated and once each year from the total of such deductions the current premium on the total of the group insurance policies outstanding and issued pursuant to an underlying insurance contract between Continental and the insurance company was paid. No part of any such premium withheld was returned or returnable to the employee by reason or in the event of such employee's resignation

or termination of his group policy. Each year for the period involved herein, the balance in the account derived from such deductions from employee's salaries and from dividends on the policies was sufficient to pay the premiums due on the policies and any balances in the account after such payment of premiums was refunded pro-rata to the then insured employees of Continental. During the entire period Continental's books showed the amounts as accounts payable. The claimed underpayment in this respect is $310.89.

Funds in class (4) above were withheld from employee's salaries at their written request for the purchase of government bonds. Any funds in an account of an employee to be used for the purchase of government bonds were payable to the employee in the event of his death or termination of employment. From the time such funds were deducted until they were paid out, Continental's books showed the amounts as accounts payable. The claimed underpayment as to class (4) is $67.21.

Cash Items

Attached hereto, marked Exhibit "C" and by this reference made a part hereof, is a true and correct copy of the form of deposit slips furnished by Continental during the period involved for the use of its customers in making deposits with Continental.

23 The term "processed" as used herein refers to the operations performed by Continental in confirming the fact that the totals on deposit slips, transmittal letters or adding machine tapes correspond with the total face amounts of checks, drafts and other items received from customers including correspondent banks; sorting checks, drafts and other items by geographic place of payment; the establishment of totals for each of the sorts so made, the listing of the checks, drafts and other items

either on transmittal letters or on adding machine tapes.

The term "dispatched" as herein used refers to the physical sending of checks, drafts and other items for collection, by mail, messenger, express or other recognized means of transportation.

It was the regular practice of Continental, during the period involved, to employ a partial working force Saturdays and Sundays, although non-business days, and also during non-business hours on Monday and through and including Friday, for the purpose of expediting collection of the great volume of cash items received by Continental.

(d) Continental has, with respect to assessments due under the Act as amended September 21, 1950 and computed for the base days of December 31, 1951, March
24 31, 1952 and June 30, 1952, each of which base days was a Monday, taken deductions for cash items drawn on out-of-town drawees, which were received by Continental on the preceding Friday evening after the closing of its books, or on Saturday, or on Sunday and which were processed and dispatched for collection prior to said base days of Monday. The amounts of the deposit slips covering these cash items were posted to the credit of the customers on the books of Continental under the dates of the said respective Monday base days. The offsetting entries involving these deposit slips were also posted on the books of Continental under the dates of the said respective Monday base days. These cash items remained uncollected on the said base days. The claimed underpayment is $42,324.12.

(e) Continental has, with respect to the assessments due under the Act as amended September 21, 1950 and computed for the base days of December 31, 1951, March 31, 1952 and June 30, 1952, each of which base days was a Monday, taken deductions with respect to cash items drawn on out-of-town drawees, which were received on

Friday evening after the closing of the books or on Saturday, or on Sunday but which items were not fully processed until the following said base days of Monday, on which base days the processing was completed and the items dispatched for collection by Continental. The amounts of the deposit slips covering these cash items were posted to the credit of the customers on the books of Continental on said base days. The said items remained uncollected on the respective base days. The offsetting entries involving these deposit slips were also posted on the books of Continental under the dates of the said respective Monday base days. The claimed underpayment is $8,013.95.

(f). Continental has, with respect to assessments due under the Act as amended September 21, 1950 and computed for eight base days, including the said three Monday base days, taken deductions with respect to cash items drawn on out-of-town drawees which were received by the Bank on said base days, processing of which had commenced but which were not completely processed and were not dispatched for collection by Continental until the day following said base days. The amount of the deposit slips covering these cash items were posted to the credit of the customers on the books of Continental under the dates of the respective base days. The offsetting entries involving these deposit slips were also posted on the books of Continental under the dates of the said respective base days. The claimed underpayment is $14,252.70.

(j) In its certified statements for the period from July 1, 1950 through June 30, 1953 Continental deducted as cash items Series E Government Bonds for which it had not given credit to customers' deposit accounts but had cashed on the base days, and which Continental held for collection at the close of business on said base days. The claimed underpayment is $2,493.13.

And It Is Further Stipulated And Agreed that this stipulation may be received in evidence herein and
26 **thereupon shall be filed and become a part of the record herein.**

And It Is Further Stipulated And Agreed that nothing herein contained shall preclude the parties from exercising, and they hereby reserve, the right to appeal from any judgment which may be entered hereafter by the Court in this case.

/s/ John H. Bishop
/s/ William M. Doherty
Attorneys for Plaintiff
Frank D. Mayer
Louis A. Kohn
Attorneys for Defendant

27 **EXHIBIT A**

Continental Illinois National Bank
and Trust Company of Chicago
231 South LaSalle Street
Chicago, Illinois

Gentlemen:

Our methods of selling merchandise to the public include, among others, that known as our "Easy Payment Plan". Under that Plan, Buyers sign and deliver to us Conditional Sale Contracts on one of several forms, all substantially the same, a specimen of one of which (entitled "Easy Payment Order Blank") is hereunto annexed and made a part hereof. For our accounting purposes, we divide our fiscal year into thirteen periods of four weeks each, each of which periods is hereinafter referred to as an "Accounting Period".

It is our practice, while accounts under Contracts of

some such Buyers are partially unpaid and outstanding, to sell them additional merchandising on our Easy Payment Plan. The Contract taken by us in connection with each such sale is given a number which identifies it with the Buyer's prior Contract and the amount to be paid thereunder is added to or consolidated with the amount shown upon our ledger sheets as being then owing from that buyer. We refer herein to such a sale as an "add-on". Usually the add-on is payable by increasing the amount of the Buyer's monthly payments or by extending the period during which monthly payments are to be made. Each Contract which constitutes an add-on is for the purposes hereof an independent Contract.

We desire, from time to time, to offer you such Contracts, as we have hereinbefore referred to, for purchase by way of discount as hereinafter provided, but without recourse upon us except as hereinafter set forth, evidencing deferred-payment-obligations of Buyers from us of merchandise and payable in installments over a period not exceeding thirty-six (36) months. In order to induce you so to acquire such Contracts, at your option from time to time, We Hereby Agree as follows:

(1) That, whenever we may desire you to acquire as aforesaid such Contracts, we will submit to you a statement in writing, in form substantially as per Exhibit
28 "A" hereto attached, setting forth the aggregate amount owing under such Contracts. We will accompany each such statement with a duly executed assignment to you, in form substantially as attached, of all our right, title and interest to and under the Contracts referred to in the said statement and to the merchandise sold thereunder, and contemporaneously therewith, we will mark each of our individual ledger sheets pertaining to such Contracts with the words: Sold To Continental Illinois National Bank And Trust Company of Chicago.

(2) We hereby warrant: (a) that the aggregate amount set forth in the aforesaid statement will, as of the date of such statement (subject to minor adjustments for pending credits or debits) be owing under the Contracts offered to you for acquisition hereunder; (b) that each such Contract will represent a valid deferred-payment-obligation of a bona fide Buyer of merchandise from us; (c) that, under the terms of each such Contract, title to the merchandise sold thereunder shall be reserved in us, free and clear of all liens and encumbrances except such interest therein as the Buyer or those claiming through him may have under such Contract; (d) that each assignment executed and delivered to you by us under Paragraph (1) hereof will vest in you our entire right, title and interest in and to the Contracts referred to in such assignment and our entire right, title and interest in the merchandise sold thereunder; (e) that no Contract sold to you hereunder will violate the provisions of Regulation W adopted August 21, 1941 by the Board of Governors of the Federal Reserve System as officially interpreted from time to time: (f) that, at the time of our conveyance of the Contracts to you hereunder, they will be free and clear of all liens and encumbrances whatsoever and not subject to any offset, counterclaim or other defense; (g) that we will duly fulfill all obligations on our part to Buyers under or in connection with Contracts acquired by you hereunder. If any Contract acquired by you hereunder shall be in violation of any one or more of the foregoing warranties, then promptly after the end of the Accounting Period in which such violation shall become known to you or to us by reason of the relative Buyer having failed or refused to make any payment under such Contract or by reason of the relative Buyer having contested the validity of the Contract, we will pay you the amount then remaining under such Contract, plus

such amount of "additional discount" as may then have accrued hereunder thereon, and upon the receipt by you of such payment, you shall re-assign such Contract to us without recourse upon you.

(3) That, for each such Contract which you shall have acquired hereunder, we will pay you a "cash discount" amounting to ⅛ of 1% of the amount owing to the Buyer thereunder at the time of such acquisition by you and such "additional discount" as may be mutually agreed upon in writing from time to time (the "additional discount" provided for in any such agreement, shall not apply to any Contracts theretofore acquired by you hereunder); that at the time of your acquisition of each such Contract you shall remit to us a sum equal to ninety per cent. (90%) of the amount then owing by the Buyer thereunder less the "cash discount" payable by us to you in respect of such Contract, which cash discount shall be deducted therefrom and retained by you for your account; that you will deposit in and credit to us in an account to be set up on your books, (which account is hereinafter referred to as the "Contract Reserve") a sum equal to ten per cent. (10% of the amount then owing by the Buyer under such Contract. Promptly after the end of each Accounting Period we will remit to you the "additional discount" then accrued in respect to each such Contract so acquired by you hereunder.

(4) That, while this agreement is in effect, we will keep for you in our store (s) at:

the locations specified on the attached list (Exhibit "B").

or at such other locations as may be mutually agreed upon, all Contracts acquired by you hereunder, together with such books of account and other records as will enable you, or your designee(s), to determine at any time(s) the status of the Contracts which shall have been acquired

by you hereunder; that we will permit you at any time and from time to time to inspect, audit, check and make abstracts from our books, accounts, records, correspondence or other papers of any matters pertaining to each such Contract, and, upon request from you, we will deliver to you, at our own cost and expense, any such Contracts as shall have been acquired by you hereunder and such of our records pertaining thereto as you may deem essential to enable you to enforce your rights under such Contracts or under this Agreement.

(5) That, until such time as you notify us in writing of the revocation of such power and authority, we will, at our own cost and expense, but as your Agent, endeavor to collect from the Buyer the amount owing under each Contract acquired by you hereunder as and when the time becomes due, and we shall have the power and authority on your behalf, but at our own cost and expense, to repossess the merchandise sold under any such Contract in the event of a default thereunder, and, subject to the provisions of paragraph (8)B hereof, to take such other actions(s) with respect to any such defaulted Contract, or the relative merchandise, as we, in the absence of instructions from you, may deem advisable.

(6) That if the buyer under any Contract, acquired by you hereunder, shall be granted by us, (or if it shall be determined that the Buyer is entitled to) any rebate or adjustment on such Contract, we will pay you promptly after the end of the Accounting Period in which any of said events occur, the amount by which the rebate or adjustment reduces the amount owing under the Contract, together with the amount of "additional discount", if any, accrued upon the amount so paid to you.

(7) That, promptly after the end of each Accounting Period, we will prepare and submit to you a statement

in form substantially as per Exhibit "A" hereto attached, setting forth the total collections received by us from Buyers during such Accounting Period under the provisions of paragraph (5) hereof, the charges which may properly be made to the Contract Reserve under the provisions of paragraph (8) hereof, and such other information as is needful for the purpose of effecting an accounting and settlement hereunder. Promptly after the end of each Accounting Period, we will remit to you for your account ninety per cent. (90%) of the total of said collections so received by us during such Accounting Period, and, out of the remaining ten per cent. (10%) thereof, we will remit to you to be credited to the Contract Reserve a sum equal to ninety per cent. (90%) of such amount(s), if any, as you shall have properly charged to the Contract Reserve during such Accounting Period under the provisions of paragraph (8) hereof. The balance, if any, of the collections so received by us from Buyers during such Accounting Period shall be applied first to reimburse the Contract Reserve for ninety per cent. (90% of any charges previously made to the Contract Reserve under the provisions of paragraph (8) hereof, for which it shall not have theretofore been reimbursed hereunder; after which, the remainder, if any, of the collections so received by us from Buyers during such Accounting Period shall be retained by us as our own property. At the end of each Accounting Period, you shall withdraw from and charge to the Contract Reserve and retain for your account an amount equal to ten per cent. (10%) of the collections received by us from Buyers during such Accounting Period under Contracts acquired by you hereunder, but we shall not, by virtue thereof, be required out of collections to remit to you for credit to the Contract Reserve the amount of the charges so made to the Contract Reserve.

(8) A. That, should the Buyer under any Contract,

which shall have been acquired by you hereunder, fail to make payment(s) during any period of six (6) consecutive months amounting to at least a sum equivalent to the
31 largest payment which shall have become due there under during that period, we will promptly after the end of the Accounting Period in which such failure shall have eventuated notify you to that effect, whereupon the amount remaining unpaid to you under such Contract shall be charged to the Contract Reserve, or, in lieu thereof, we may, at our option, remit to you from such funds as could otherwise be retained by us under the provisions of Paragraph (7) hereof, for credit to the Contract Reserve, an amount equal to ninety per cent. (90%) of the amount then remaining unpaid under such Contract (which Contract shall thereafter constitute a "Defaulted Contract" under the provisions hereof) and we shall mark the relative ledger sheet with the word: Defaulted and with the date when such failure eventuated. It is understood, however, that, notwithstanding any such remittance, the amount which may then or thereafter be owing you under the relative Contract may be charged by you at any time to the Contract Reserve under advice to us, and that such amount shall be so charged at any time upon our request, if the amount owing under the Contract is for any reason determined by us to be uncollectible (subject to your approval, however, as to any such Contract on which you may request evidence of uncollectibility), and each such charge shall be deemed to have been made, to the extent of 90% thereof, to funds remitted to you under this paragraph relative to said Contract. It is further understood that, whenever we shall have made any remittance to you with respect to any "Defaulted Contract" except remittances under this pragraph (8)A, you will release to us from the Contract Reserve a sum equal to ninety per cent. (90%) of the amount credited on said Contract under the

provisions of this agreement in connection with such remittance; provided, however, that no amount is to be released from the Contract Reserve on account of any such remittance with respect to any "Defaulted Contract" if the total amount then to the credit of the Contract Reserve shall be less than the "Minimum Contract Reserve" specified in paragraph (10) hereof.

It is stipulated that the foregoing provisions of this paragraph 8(A) shall not be applicable to any Contract, or portion thereof, which constitutes an "add-on", so long as the unpaid baalnce of the Contract of such Buyer to which the "add-on" relates has not been charged to the Contract Reserve under the provisions of this paragraph (8)A. However, if and when all payments under any Contract to which an "add-on" relates shall have been made by the Buyer thereunder, then the Contract(s) constituting the "add-on" shall be subject to the foregoing provisions of paragraph (8)A.

(8) B. That, if and whenever any merchandise relative to any Contract acquired by you hereunder shall
32 be returned, repossessed or rejected by the Buyer, irrespective of the reason therefor, we will repurchase your entire right, title and interest in and to such repossessed, returned or rejected merchandise, and, in payment therefor, either, at our option, (a) remit to you for your account the amount of the unpaid balance owing thereon by the Buyer, or (b) authorize you to charge said amount to the Contract Reserve, in which latter event, we will endeavor to resell said merchandise and (unless the Contract Reserve shall have been in the meantime reimbursed for said charge as provided in Paragraph (7) hereof) remit to you for credit to the Contract Reserve the net proceeds, if any, from the resale thereof, after first deducting our reasonable expenses for repairing, reconditioning and reselling said merchandise.

(8) C. That, whenever any charge with respect to any Contract shall have been made to the Contract Reserve under this paragraph (8) and when you shall have received for credit to the Contract Reserve the amount with respect thereto agreed to be remitted by us under paragraph (7) hereof, it is our understanding that any collections thereafter received on such Contract will be retained by us as our property and that you will, upon written request from us, reassign the relative Contract to us without recourse upon you.

(9) That, should the Buyer under any Defaulted Contract which has not been previously charged to the Contract Reserve make payments equivalent to at least three full monthly installments over a period of three consecutive months, the Contract will, subject to your approval, then be removed from the Defaulted Contract classification, whereupon you will release to us from the Contract Reserve ninety per cent. (90%) of the balance remaining on such Contract; provided, however, that no amount is to be released from the Contract Reserve for reinstatement of such Defaulted Contracts if the total amount then to the credit of the Contract Reserve shall be less than the "Minimum Contract Reserve", as specified in paragraph (10) hereof.

(10) That, if the amount to the credit of the Contract Reserve at the end of any Accounting Period shall be less than the sum of the "Minimum Contract Reserve" as hereinafter specified, the amount, if any, which, under the provisions of paragraph (7) hereof, could be retained by us at the end of such Accounting Period, shall, to the extent required to bring the Contract Reserve to the sum of the "Minimum Contract Reserve", instead of being so retained, be remitted to you to be deposited to our credit in the Contract Reserve. If the amount to our credit in the Contract Reserve at the end of any Ac-

counting Period shall exceed the sum of the "Minimum Contract Reserve", we shall be entitled to withdraw for our account from the Contract Reserve the amount of such excess. The term "Minimum Contract Reserve" as used herein, shall mean the sum of $350,000, (changed to $700,000 See letter 12-19-47) or 10% of the aggregate amount then owing to you by Buyers under Contracts, exclusive of Defaulted Contracts, previously acquired by you hereunder, whichever may be larger, plus a sum equal to 100% of the aggregate amount then owing by Buyers under Defaulted Contracts.

(11) That, if and when the aggregate amount owing to you under Contracts acquired by you hereunder shall have been reduced to an amount equal to the sum to our credit in said Contract Reserve, we will repurchase from you and you will sell and re-assign to us without recourse against you, all such Contracts for and in consideration of our releasing and transferring to you all of our right, title and interest in and to the amount then to our credit in said Contract Reserve. We will also promptly pay you all "additional discount", if any, then accrued and unpaid hereunder.

(12) That ninety per cent. (90%) of the amount of the payments (excluding the "additional discount", if any, accrued thereon) which are provided to be made to you by us under the provisions of paragraphs (2), (6), and (8) B hereof, will, when due, be made from funds other than those at any time(s) to the credit of the Contract Reserve and from funds other than those collected by us from Buyers under paragraph (5) hereof. The remaining ten per cent. (10%) of the amount of such payments (excluding the "additional discount" accrued thereon) shall be by you charged to and withdrawn from the Contract Reserve for application to the amounts(s) then owing you under or on account of the relative Contract(s).

(13) That the form of said Contracts will not be substantially changed by us until notice in writing specifying the proposed change(s) shall have been given by us to you.

34 (14) This agreement may be terminated upon at least sixty (60) days' prior notice in writing given by either of us to the other, but any such notice shall not affect the obligations on our part or on your part hereunder as to Contracts then owned by you hereunder or in which you have any interest at the time of the receipt of such notice. Promptness in making any claim or demand is hereby waived by the parties hereto.

(15) This agreement and the "additional discount" letter herewith executed and delivered under the provisions hereof, cancel and supersede as of the date hereof the agreement between you and our Company of September 23, 1940, the amendments thereto dated August 14, 1941, September 26, 1942, (1941 see letter 6-21-44) March 11, 1943, and May 21, 1943, and the "additional discount" letter executed and delivered under the provisions thereof, all pertaining to your purchase from us by way of discount of Conditional Sale Contracts; it being stipulated, however, that our respective rights and obligations with reference to the amount in the "Contract Reserve" as of the date hereof, which was created under said former agreement and amendments, and with reference to Contracts heretofore acquired and now owned by you under said former agreement and amendments, shall be governed and controlled by the provisions of this agreement and of the "additional discount" letter herewith executed and delivered under the provisions hereof.

If the foregoing is acceptable to you, kindly so indicate by signing the attached copy and returning the same to us.

Very truly yours,

(page 30 is blank)

CONTRACTS PURCHASED BY:

_____

_____ ACCOUNTING PERIOD NO. _____ ENDING _____

ITEM	CONTRACT PURCHASE ACCOUNT	NO. ACCTS.	AMOUNT	%	ITEM	CONTRACT RESERVE	DEBIT	CREDIT	ITEM	SETTLEMENT	DEBIT (DUE BANK)	CREDIT (DUE COMPANY)
1	BALANCE— BEG. THIS PERIOD			100.0	21	BALANCE— BEGINNING THIS PERIOD		X X				
2	NEW CONTRACTS— THIS PERIOD			X X	22	10% OF NEW CONTRACTS ITEM 2	X X		42	90% OF NEW CONTRACTS— ITEM 2	X X	
3	TOTALS			X X	23	TOTAL	X X					
4	PAYTS. BY BUYERS				24	10% OF BUYERS PAYMENTS ITEM 4	X X		44	90% OF BUYERS PAYMENTS— ITEM 4		X X
5	MDSE. RETURNED				25	10% OF MDSE. RETURNED— ITEM 5	X X		45	90% MDSE. RETURNED— ITEM 5		X X
6	REPOSSESSIONS				26	100% OF REPOSSESSIONS— ITEM 6	X X			COMPANY WITHHOLDINGS ELIGIBLE FOR RESERVE REIMBURSEMENT	X X	X X
7	UNCOLLECTIBLE				27	100% OF UNCOLLECTIBLE ITEM 7 (CHARGE OFFS)	X X		47	PLUS ITEM 24 $	X X	X X
8	TOTALS				28	TOTAL	X X		48	PLUS ITEM 25 $	X X	X X
9	BAL.—END OF PERIOD (ITEM 3 LESS ITEM 8)			X X	29	Balance Before Adjustment (ITEM 23 LESS ITEM 28)	X X			TOTAL $	X X	X X
					30	Reimbursement for 90% of Charge-Offs and Repossessions (ITEM 26 AND 27)	X X		50	LESS ITEM 30 $		X X
										TOTAL ELIGIBLE $	X X	X X
	DEFAULTED CONTRACTS (INCLUDED ABOVE)				31	DEFICIENCY CREDIT FROM COMPANY	X X		51	LESS ITEM 31 $		X X
					32	EXCESS PAID TO COMPANY		X X	52	PLUS ITEM 32 $	X X	
13	BALANCE— BEG. THIS PERIOD	X X		X X					53	$	X X	X X
14	DEFAULTED THIS PERIOD	X X		X X	34	ADDITIONAL RESERVE ON DEFAULTED CONTRACTS— 90% OF ITEM 14	X X		54	LESS ITEM 34 $		X X
15	CREDITS—THIS PERIOD	X X		X X	35	RESERVE DUE COMPANY FOR DEFAULTED CONTRACTS COLLECTED-90% OF ITEM 15		X X	55	PLUS ITEM 32 $	X X	
16	BAL.—END OF PERIOD	X X		X X					56	RETAINED BY COMPANY $	X X	X X
						% OF ITEM (9)				DISCOUNT CALCULATION		
					36	BALANCE—END OF PERIOD	X X			ADDITIONAL DISCOUNT @ ____%		
									57	PER ANNUM ON $ (ITEM 1 LESS ITEM 21)	X X	X X
						REQUIRED RESERVE				FROM _____		
	NET CONTRACTS— (Less Defaulted Contracts)									TO _____		
17	(ITEM 9 LESS ITEM 16)	X X		X X	37	$ _____ OR 10% OF ITEM 17 WHICHEVER IS LARGER	X X			OR ____ DAYS @ _____		
					38	100% OF ITEM 16	X X		58	IS $	X X	X X
					39	TOTAL REQUIRED RESERVE	X X		59	LESS: CASH DISCOUNT PAID AT LAST SETTLEMENT DATE $	X X	X X
					40	DEFICIENCY-END OF PERIOD	X X		60	PLUS: CASH DISCOUNT @ 4½% ON $ $	X X	X X
									61	(ITEM 21) TOTAL $		X X
									62	TOTALS		
									63	NET AMOUNT DUE COMPANY		X X
									64	NET AMOUNT DUE BANK	X X	
									65			

Exhibit B

BY _____

DATE _____

F2746 Rev. 9-25-47

ACCEPTED:

BY _____

DATE _____

Exhibit C

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

FOR DEPOSIT TO THE ACCOUNT OF

(PLEASE PRINT OR WRITE CLEARLY COMPLETE TITLE OF ACCOUNT)

DATE

SUBJECT TO THE TERMS AND CONDITIONS OF THE AGREEMENT PRINTED ON THE BACK HEREOF.

Checks	Checks	Checks

Checks	Checks	Checks

Exhibit C

Checks	
Currency	
Coin	
TOTAL DEPOSIT	

B5a

1-0-205
R-12-53

36 • • •

37

IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action No. 54 C 1667) • •

Transcript of proceedings had in the above entitled case before Honorable J. Sam Perry, one of the judges of said court, in his courtroom in the United States Court House, Chicago, Illinois, on November 21, 1955.

Present:

Messrs. Bishop, Burdett, Falasz & Doherty,
By: Mr. John H. Bishop and
Mr. William M. Doherty,
and
Mr. Goodwin J. Oppegard,
appeared on behalf of plaintiff;

Messrs. Mayer, Friedlich, Spiess,
Tierney, Brown & Platt,
By: Mr. Frank D. Mayer and
Mr. Louis A. Kohn,
appeared on behalf of defendant.

38 By the Clerk: 54 C 1667, Federal Deposit Insurance Corporation v. Continental Illinois National Bank and Trust Company, for trial.

The Court: You may proceed, gentlemen.

Mr. Bishop: If your Honor please, I would like to present Mr. G. J. Oppegard, Assistant General Counsel of the Federal Deposit Insurance Corporation, who will appear as co-counsel with Mr. Doherty and myself, for the plaintiff.

The Court: Very well. You may proceed.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

By Mr. Bishop:

If the court please, this is a suit by Federal Deposit In-

surance Corporation to recover assessments for the years 1948 to 1953. It does not cover the entire assessment for the bank for those years, but only certain categories that are in dispute between the parties to the suit.

The assessment, for your Honor's information, is in effect the premium that the insured bank pays to the Federal Deposit Insurance Corporation for the insurance that is extended pursuant to the statute.

The suit as originally filed was for $177,448.46. As
39 the result of the efforts of Mr. Mayer and myself to stipulate the facts, our auditors made certain investigations of the books of the bank, in cooperation with their auditors, and as a result of that certain concessions were made by the bank under which they admitted they owed us $82,283.52 which, with interest, brings the conceded amount up to $84,181.75.

I understand from Mr. Mayer that they propose to pay that this morning so that that eliminates from the case that amount of money.

The Court: Leaving a balance of how much?

Mr. Bishop: Of $95,164.84.

If your Honor please, as a result of those concessions and the elimination of those items which were contested, which were involved in those concessions, the case has narrowed itself down to four classes of claims by the Federal Deposit Insurance Corporation against the bank.

In our summarization of it in the stipulation of facts we refer to them, first, as reciprocal bank balances; secondly, as contract reserve accounts; third, trust and agency deposits; and, fourth, cash items.

40 Mr. Mayer: May I interrupt a moment?

Mr. Bishop: Yes.

Mr. Mayer: I think the trust and agency accounts have been resolved.

Mr. Bishop: No. That is those payroll deductions.

The term "cash items" is a term probably not familiar to your Honor, but a little later I will try to explain it a little more, so we will understand what we are driving at.

As I said a moment ago, we have agreed on the basic facts surrounding this controversy. There are certain facts that we could not agree upon, which I don't think actually are disputed between us, but which, for either policy reasons or because there is no way of checking them, we were unable to agree upon; and in that respect we will offer some proof which I don't think will take very long.

With the Court's permission I would like to go back to try to explain initially the statute under which this controversy arises.

So that the court may get a better picture of what we're trying to get at, while I realize it isn't strictly a part
41 of an opening statement, I am going to ask the indulgence of the court and Mr. Mayer to go into that very briefly and if I get too far afield I am sure you will stop me.

The Court: If I don't Mr. Kohn will.

Mr. Bishop: The Federal Deposit Insurance Corporation was created by statute in 1935, as your Honor knows, as a mammoth insurance agency. It receives no congressional appropriations but it operates solely on assessments which it receives from insured banks. Now, those assessments are based on the total deposit liability of the bank, and the rate of assessment is one-twelfth of one percent per annum, payable in semiannual installments.

Now, the deposit liabilities of the bank are defined in the statute, and from those deposit liabilities certain deductions are permitted by the statute and the deductions I would say generally are permitted so that two banks don't pay on the same item; they are principally items in process

of collection that the reporting bank is permitted to take—

42 **The Court:** It would be a credit to one and a charge to the other, a debit to the other.

Mr. Bishop: That is right. Each bank which is insured is required to file certified statements semiannually.

The Court: I follow your philosophy. It is too bad our real estate taxes are not proportioned in that way so that the mortgage holder would have to pay his share of the tax.

Mr. Bishop: Well, Judge, maybe there is something we could do about that.

The Court: It just seems so apropos. I follow your reasoning there. If you have a deposit in one bank, a credit in one bank and a liability in another bank, and the duplication of payment could very likely be collected if you did not watch the bookkeeping.

Mr. Bishop: That is right. That is the purpose of permitting the deductions.

For the years in question here, from 1948 through 1953, the Continental Bank excluded from its deposit liabilities certain items and it took deductions from its deposit liabilities of other items. The sole controversy revolves

43 around those so-called exclusions and deductions which I mentioned to your Honor a moment ago in the four categories that I stated originally, the reciprocal bank balances, the contract reserve accounts, the trust and agency accounts and the cash items.

I would like to detail as briefly as I can the facts with respect to reciprocal bank accounts.

The Continental Bank maintained reciprocal accounts with twenty-six banks in different cities in the United States. A reciprocal account in banking parlance and in the parlance of the F.D.I.C., is a relationship where one bank maintains a deposit in another bank and that

bank maintains a deposit in the Continental. For example, there is a reciprocal relationship, we will say, between Continental and a bank in Pittsburgh, and the Pittsburgh bank has a deposit in the Continental Bank and the Continental Bank has a deposit in the Pittsburgh bank.

The Court: Of course, they vary from to time.

Mr. Bishop: They vary daily just like anybody else's deposit does.

44 The Court: And of course you have one with The First National, I take it locally?.

Mr. Bishop: No, not reciprocal. They clear through the Federal Reserve so that they do not maintain reciprocal bank accounts—

The Court: Oh, I see, only out-of-the-city banks.

Mr. Bishop: Out-of-the-city banks.

The Court: I see, it is handled through the Federal Reserve here.

Mr. Bishop: Yes.

The Court: All right.

Mr. Bishop: In reporting their deposit liabilities for the years in question, the Continental Bank netted the balances with those reciprocal accounts. For example, take the same illustration: Let's say that the Continental had on deposit a million and a half in the Pittsburgh bank and the Pittsburgh bank had a deposit of a million in the Continental. There the Continental excluded the million dollars from its deposit liabilities and would report the net.

45 The Court: I get it.

Mr. Bishop: In other words, as the statute speaks of it or as the F.D.I.C. speaks of it, there is a due—to balance and a due—from balance.

The Court: They took the net.

Mr. Bishop: That is right.

The Court: And, of course, the other bank made no report.

Mr. Bishop: Well, that is the anomaly of it. The other bank did report the amount which it owed to the Continental, but the Continental did not report the amount which it owed to the other bank.

Mr. Mayer: I must object and move that statement be stricken because I do not think there is going to be any—

Mr. Bishop: There will be proof on that.

The Court: Well, anyhow, that is a mere statement. I will rely on the proof. He is trying to analyze it. I appreciate the significance of it.

I am beginning, I think, to get at the core of the problem.

Mr. Bishop: There will be proof on that, your Honor.

46 Mr. Mayer: Of course, the proof will be objected to as irrelevant. What other banks do and you do not object to is not material here.

The Court: What we are getting at is what the net balance would be with all the proof in.

Mr. Mayer: That is correct.

Mr. Bishop: Shall I proceed, your Honor?

The Court: I follow it. I see the significance. It might be that one bank would say. "Well, we have on deposit a half a million down there in that bank more than they have, and therefore we will just report this half a million, and that is all that we owe on," figuring there is no use in wasting bookkeeping time on it.

I don't know, but it may be—

Mr. Bishop: Well, it goes a little deeper than that, if your Honor please.

The Court: It probably does, but in a cursory manner that is the idea.

Mr. Bishop: The statute provides that the banks shall report and pay assessment on the total deposit liabilities without deduction of the indebtedness of any depositor.

Now the position of the F.D.I.C. is that where the
47 Pittsburgh bank maintains a balance of a million dollars in the Continental that is a deposit liability the same as any other deposit liability. And if the Continental maintains a deposit in the Pittsburgh bank—

The Court: Of a million and a half.

Mr. Bishop: —that is an indebtedness of the Pittsburgh bank which you are not entitled to set off against the amount due to the Pittsburgh bank.

The Court: And the Pittsburgh bank should make a report of a million and a half deposits.

Mr. Bishop: That is right.

The Court: That is your interpretation of the law.

Mr. Bishop: That is correct.

The Court: And their interpretation of the law is that there should be a net deposit of one-half million.

Mr. Bishop: That is right.

I have to ask my experts, your Honor, at times if I make these things clear, because they had to educate me on the banking situation, and—

The Court: Both sides will have to educate me, because if there is anything I know nothing about it
48 is banking.

Mr. Mayer: Maybe in the course of this case both sides will get educated too.

The Court: If it is coal mining or farming or something like that I would know about it. But when you talk about banking I don't. So you will accommodate me if you will rely on your experts from time to time.

Mr. Bishop: I would say I would feel a little more comfortable if we were talking about farming and coal mining than I am talking about the technicalities of banking, your Honor.

As I say, the whole controversy revolving around reciprocal bank balances, revolves around the principle that

I have just explained to your Honor; that is, the deduction of the balances on deposit from the deposit liabilities of the bank, which we say are directly in the teeth of the statute.

The Court: In other words, we have a conflict between the spirit and the letter of the law, is that what this really amounts to?

Mr. Bishop: I don't know whether it goes that deep.

The Court: It looks to me like it is a contest be-
49 tween the spirit and the letter, right offhand.

Mr. Bishop: Well, we won't ask your Honor to pre-judge that.

The Court: No. We will see what the cases say, what the Supreme Court might say. They might have another interpretation, if there has been any interpretation by the Supreme Court.

Mr. Bishop: I am sorry to say that there is not an interpretation of that particular section of the statute.

The Court: We will see what the persuasion of counsel is.

Mr. Bishop: Your Honor is going to have to determine that yourself.

The total under-assessment on that branch of the case is $24,755.42.

The Court: Is that to date, or is that without interest?

Mr. Bishop: That is the total amount involved, because the statute was amended in 1951 to permit banks to net the reciprocal accounts. So what we are talking about—

The Court: I see. What you are talking about is the law before it was amended?

50 Mr. Bishop: That is right. So the question—

The Court: Or before the letter was made to conform with the spirit?

Mr. Bishop: Again I cannot quite go along with your Honor on that.

The Court: I don't know what the law is. The law may be that I have to decide it according to the letter of the law. There are many cases where you have to conform to the letter of the law.

I had to fine a man a dollar for not getting his license to gamble, because I had to conform to the letter of the law.

Go ahead, gentlemen.

Mr. Bishop: The second class of claims is the so-called contract reserve accounts.

Continental entered into a contract in 1944 with one of its customers who, for public relations purposes, has not been named in the stipulation and I do not intend to mention them here. It is one of the large corporations operating nationally, selling a lot of merchandise on time payment plans.

The Court: Well, it is not material to the issues. It could be X Corporation, as far as the record is concerned.

51 Mr. Bishop: It does not matter who it is. The bank purchased under the terms of that contract entered into in 1944 large quantities of conditional sales contracts. Under the terms of the contract they paid themselves a cash discount of one-eighth of one percent. They remitted to the seller of the paper ninety percent of the face amount of the contracts, less the one-eighth of one percent.

Under the terms of the contract the Continental Bank was required to deposit in and credit to the account of the customer the remaining ten percent of the face amount of the contracts purchased.

The Court: Nine and seven-eighths was required to go to the customer.

Mr. Bishop: The full ninety percent. They took out one-eighth of one percent and then they remitted the difference between ninety percent and—yes, your Honor said it right. Eighty-nine and seven-eighths percent of the face amount was remitted directly to the customer, and the other, according to the contract, was required to be deposited in and credited to the so-called contract reserve account.

After those contracts were purchased the customer
52 collected the amounts due on the contract, and as they were collected remitted ninety percent of the collections to the bank. The other ten percent was retained by the customer under certain conditions specified in the contract. And then, periodically, there would be an accounting between the bank and the customer.

During the period that elapsed between those accountings, if there were defaults on any of the contracts purchased, the bank charged the defaulted contracts against this contract reserve account. If the contract reserve account fell below a minimum of $700,000 then the customer was required to build it up to that figure. If it went above that figure the customer was entitled to draw the overage out of it.

The F.D.I.C. claims that that is a deposit liability within the definition of the statute—the statutory definition of a deposit—and that it must be included in the deposit liabilities of the bank on which assessments are paid.

The Court: And, conversely, the bank claims what?

53 Mr. Bishop: I don't know just exactly what they do claim. I am going to let Mr. Mayer tell you that himself. I frankly don't understand—

Mr. Mayer: Do you want me to tell it now, or—

The Court: No, no. That is all right. I just thought, since he was summarizing it that he might be able to give me that viewpoint. That is perfectly all right to wait.

When you come to it you may review it, because this is getting a little technical. My mind is a little foggy on that, so I may have to have that reviewed some.

Point No. 1 is clear in my mind; point No. 2 is not yet clear in my mind—

Mr. Bishop: Instead of trying to belabor it in my opening statement, I think if your Honor will read the contract and then we come to the discussion of it later, it will be much clearer to you.

The Court: That is all right. I am getting a bird's-eye view of it now.

Mr. Bishop: I have tried to give your Honor a picture of it.

The Court: I will fill in the details all right.

Mr. Mayer: I am assuming, if your Honor please, 54 that this is just going to be an opening statement—

The Court: That is all.

Mr. Mayer: —and that you will set it for oral argument after the final briefs.

The Court: Oh, yes. After this we will have arguments on it.

Mr. Mayer: Yes.

The Court: Surely.

Mr. Mayer: At some future date, I assume.

The Court: Arguments or briefs.

Mr. Mayer: Well, we would like to have both, I think.

The Court: If we have briefs the arguments should be very short. When I spend the time on the briefs then I do not want to spend too much time on oral argument.

All right, counsel.

Mr. Bishop: As long as we are on that subject, I think that Mr. Mayer and I would agree that this is a case where briefs should be filed.

The issues are very technical and I think it is something that is very difficult.

The Court: That will be agreeable. We can take that up. In other words, after I take briefs and consider
55 them I am not willing to sit and listen to two or three hours of arguments. I will listen to an hour of argument, or something like that.

Mr. Mayer: I think an hour of argument would be ample.

The Court: In a matter like this, which is a case perhaps of first impression and a purely legal matter involved, it would not be like a motion for a new trial. I would be willing to give reasonable time to it.

Mr. Bishop: The amount involved in this branch of the case is $2,442.52.

As I said a moment ago, your Honor, the claim of the F.D.I.C. on this contract reserve account is that this is a deposit the same as any other deposit and that the purpose of it was as security to the bank to cover defaulted contracts. That is what the terms of it are.

The Court: Now I am beginning to see this second point. Your last statement helped me to understand it.

Mr. Bishop: Has your Honor any other questions on that? I would be happy to answer them.

The Court: No, not for the time being.

56 Mr. Bishop: The third class that I mentioned is what I have termed the trust and agency deposits. There are four classes of those.

The first one is payroll deductions from employes of the bank to pay income taxes. The second one is payroll deductions from employes to pay social security taxes. The third one is payroll deductions to pay the employes' share on the group life insurance policies. And the fourth one is payroll deductions for the purchase of Government bonds.

As to the first two classifications, that is, the deductions made by Continental to pay federal income and social

security taxes, the stipulation shows that those funds were deducted currently from the salaries of the various employes and were held by the bank until they were required under the statute to deposit them to the credit of the Treasury under the applicable regulations of the Treasury.

As I understand that, they take them out monthly, weekly or semi-monthly, whenever the men are paid, and then at the end of that month they deposit them in their own bank as a depository for the Government.

57 This covers the period of time between the actual deduction of the amounts from the employes' salaries and the time that it goes into the deposit account for the Government. Clearly there is no question but what it goes into that account, that it is a deposit. The question here is whether, from the time it is deducted until the time it is put in the Government's account—

The Court: Whether it is just an asset belonging to the bank or whether it is a cash deposit coming under the terms of the act. Is that the question?

Mr. Bishop: That is right, that is right.

Mr. Mayer: I would say whether it is a liability.

The Court: Yes, a liability.

Mr. Mayer: In other words, an account payable, but not a deposit.

The Court: Whether it is a mere liability chargeable against your general assets or whether it is a deposit, between the time of your deduction and the deposit in the account of the Government, whetner it is a mere liability or whether it should be treated as a deposit until the time you deposit it in the Government's account. That is the point.

Mr. Bishop: That is right.

58 The Court: I understand that.

Mr. Bishop: It is our claim, if your Honor please—

The Court: That the act of deducting it is in effect an act of depositing it.

Mr. Bishop: That is right, and that it is a trust or agency account, and as such under the statute it specifically is included in deposits because the statute includes trust deposits and agency deposits, the same as any others.

The Court: Your position is that the F.D.I.C. would have been responsible for losses on account of that item and, therefore, that it is included within the items—

Mr. Bishop: Yes, and the statute expressly so states. The statute states that the insurance extends to trust deposits.

The Court: Have you ever had that litigated? Has any company ever actually claimed under those deposits and been reimbursed, so that there is a case on it?

Mr. Bishop: There are no cases on it.

We are going outside the record to answer your Honor's question. The F.D.I.C. has always paid on those 59 accounts where the question arose.

The Court: That is what I want to know. You have paid on such things as that, have you?

Mr. Bishop: Mr. Oppegard tells me that there is a case pending on the question in the District Court of New York.

The Court: As to the nature of it?

Mr. Bishop: Yes.

The Court: That is just in the District Court, the same level as this court.

Mr. Mayer: And it is still pending, isn't it?

The Court: And it is still pending? That is what I mean, it is a pending case?

Mr. Mayer: That is right.

The Court: It is in no different category from this case itself.

Mr. Bishop: I would not rate the District Court of New York on the same level as your Honor—

The Court: Now, wait a minute. I think we must at least acknowledge their equality, if not their superiority.

Mr. Bishop: The Judge can, but I won't agree with you on that.

If your Honor please, the third category is the
60 deductions to pay life insurance premiums. That is, the third under trust and agency accounts.

The Court: You have had payroll for income, social security, group life—

Mr. Bishop: This is group life I am talking about now.

There the principle I think is the same except there is a very slight difference in the way it was handled. The funds that were deducted from the employes' salaries were kept by the bank until the premium due the insurance company was payable, and then those funds were used to pay the insurance premium. At the end of the year, if there were any funds left from the funds deducted, taken in conjunction with the dividends paid by the insurance company on the group life insurance, those were returned to the then employes of the bank in the form of a distribution or dividend, or whatever you want to call it.

The same section of the statute is applicable, the same principle is applicable, that is, whether they are trust funds held in deposit or whether they are mere bookkeeping entries or liabilities of the bank existing dur-
61 ing the periods of time they are held there.

Without going into any great detail about Government bond purchases, they are the same thing; they deduct the funds from the salaries of the employes, hold them until enough is accumulated to buy bonds, and it is the holding of those funds in that interim period that we claim is a trust deposit.

The amount involved in all four of those categories is

only $883.10. I do not mean to transgress, but it is a question of principle.

The Court: Has the law been amended in this instance—

Mr. Bishop: No.

The Court: —or is the law still the same?

Mr. Bishop: It has not been amended. That is a continuing situation.

The Court: So this question would be somewhat a precedent for determining that factor all over?

Mr. Bishop: From now on.

The Court: Is that true of point No. 2 as well? Would that principle be—there has been no amendment in the statute concerning principle No. 2?

Mr. Bishop: That has been amended.

The Court: It has been amended and corrected; 62 I mean clarified, shall I say?

Mr. Bishop: I will agree it has been amended, your Honor.

The Court: Well, has it not been clarified?

Mr. Bishop: Yes.

The Court: Amended and clarified?

Mr. Bishop: Yes, that is right.

The amendment to the statute, which came in 1951, expressly permitted the deduction. There was no question of clarification.

The fourth class of items involved in this lawsuit is what I referred to initially as cash items. Cash items in ordinary layman's language means checks; drafts, other instruments of that character, providing for the payment of money, which your Honor and I would call checks, are cash items.

The controversy develops because of certain deductions from deposit liabilities taken by the bank in the years 1951 to 1953, involving these so-called cash items.

As I stated to your Honor earlier, the statute provides for payment of assessments of one-twelfth of one percent a year on deposit liabilities. The statute specifically
63 speaks of an assessment base, which is the deposit liabilities on certain days that are designated by the statute and known as the base days.

Going back a little, your Honor, under the 1935 statute a bank, in figuring its deposit liabilities, was required to take the deposit liabilities at the close of each business day, and was permitted to deduct from those deposit liabilities the uncollected items existing at the close of business on each business day. Then they averaged the deposit liabilities at the close of each day for the whole six month period; in that way their deposit base was determined, their deposit base being their deposit liabilities on which the assessment rate was applied.

In 1950 the statute was amended to eliminate all of the work that was required in keeping the daily record of deposit liabilities and in figuring the average over the whole six months period.

The 1951 statute designated two days in each semiannual period, which it called base days.

Take the year 1955. The base days were March 31 and June 30. The bank was permitted under the
64 new statute to take the deposit liabilities on each of those base days, March 31 and June 30, and to average those two deposit liabilities on those two base days, and in that way determine its assessment base. That took the place of the averaging over the whole six months period and eliminated all the work that was required in doing that.

Under the statute the bank was to compute its assessment base from the two base days and to apply the assessment rate to the assessment base so computed, the

assessment base being the average of the total deposit liabilities on those two base days.

From that assessment base the bank was permitted certain statutory deductions. The statute says:

> "The assessment shall be one twelfth of one percent per annum payable semiannually on the total deposit liabilities on the base days from which the bank can deduct (1), (2), (3) and (4)."

One of the deductions permitted from that deposit liability figure so determined was cash items, that is,
65 checks, drafts and other items of that character, forwarded for collection on the base days.

"Forwarded for collection" can have a broad connotation. Whether it means physically forwarded, whether it means put in process of forwarding, whether it means taking it to the post office or whatever you do, is something which the statute does not define.

Under the statute, which provides that the cash items shall be forwarded for collection, the board of directors of the Federal Deposit Insurance Corporation was given the power by regulation to define cash items and to fix the maximum period for which they may be deducted in computing the assessment base.

In accordance with that power, the board of directors of the Federal Deposit Insurance Corporation adopted a regulation which said in substance that the deductions permitted would be those received and forwarded on the base days.

I am not going to try to argue that point now, because I think it would be unfair to try to argue it until we
66 get into it, but I am simply trying to give your Honor the question that we face.

The controversy arises here where the base day falls on a Monday. Let us assume that in 1951 to 1953 there were eight base days of March 31 and June 30 or Sep-

tember 30 or December 30 that fell on Mondays. The Continental Bank maintained a working force after the close of business on Friday and on Saturday and on Sunday. That working force that was in the bank over that weekend would take in large quantities of checks, drafts and other instruments for the payment of money, which we will call cash items, would sort them into geographical locations, would verify the tabulations on the deposit slips, or letters of transmittal, and would actually in some instances forward them prior to the Monday base day; for example, items that came in on Friday afternoon might be forwarded on Saturday; items that came in on Saturday might be forwarded on Monday.

In that method of operation and keeping constantly in mind that it is only Monday base days which we are concerned with, there are three types of items that were deducted that are in controversy: cash items that
67 came in on Friday afternoon after the close of business, on Saturday and on Sunday, which were forwarded for collection prior to the Monday base day. We claim they had no right to deduct them; they claim they did.

Another type of item is the item which came in after the close of business on Friday or on Saturday or on Sunday, which were forwarded on the base day; in other words, those items were received prior to the Monday base day but were actually forwarded on Monday. There the controversy revolves around whether the regulation, which provided that they must both be received and forwarded on the base day, is a valid regulation by which the bank is bound.

The other class of items would be those items which came in on Monday actually, on the Monday base day, but because of the press of business were not processed and forwarded on that day and were not forwarded until the following day. There they deducted that, and there again

we claim that those items are not proper deductions because they do not fall within the statutory definition of having been forwarded on the base day.

68 The Court: Has all of that been clarified by subsequent amendments?

Mr. Bishop: Yes.

The Court: It seems to me like we are almost getting into the field of lawmaking.

Mr. Bishop: If your Honor please, it has not been clarified by amendment to the statute.

The Court: But by regulations.

Mr. Bishop: The regulation was amended in 1954 to define the base day as the period of time from the close of business on Friday until the close of business of the next preceding business day, which, where it fell on a Monday, would be Monday afternoon.

The Court: So we do not have so much of a matter of principle to determine here—

Mr. Bishop: No.

The Court: —because the regulation has been clarified.

Mr. Bishop: No.

The Court: There is just involved a certain sum of money.

Mr. Bishop: We have in the first category $42,324.12; in the second, $8,013.95; and in the third, $14,252.70.

69 Under the cash items argument or dispute there is another, what I call a very minor item, which usually gets lost in my mind in thinking about the other three. That is, Government bonds cashed by the bank on the base day, which are held at the close of business on the base day, and which have not been credited to any depositor's account. Just as your Honor takes a Government bond into the bank and they give you the money for it, and then it remains among their assets until they take it to the Federal Reserve and get their money from that bank, they deducted those items. We claim there that that

does not fall within the definition of a cash item. That is a very simple question and it does not involve too much money.

The Court: You would not say that a Government bond was not equivalent to cash, would you?

Mr. Bishop: No, I would not, but I would say it was not a cash item within the definition of a cash item in the statute.

The amount there involved is $2,493.13.

The Court: And that again would be a question also of whether or not you would be liable if there was a claim made on account of the loss of that.

70 Mr. Bishop: That is right.

The Court: That is the crux of that problem, is it?

Mr. Bishop: That enters into it.

Mr. Mayer: No, I do not think that is involved at all.

The Court: Well, we will come to that.

Mr. Mayer: This is a deduction and not a deposit.

Mr. Bishop: Oh, I misunderstood your Honor.

Mr. Mayer: They took it out of the deposit base.

The Court: They took it out of the deposit base?

Mr. Mayer: And thereby reduced their deposits by that much.

The Court: Oh, I see. What I was getting at is, suppose that on the other hand some bank had a loss on account of that—

Mr. Bishop: Do you mean if the bank failed?

The Court: Yes.

Mr. Bishop: With that condition existing?

The Court: Yes.

Mr. Bishop: I don't think there could be a claim because the bond would be there. The bank would still have the bond, and if there was a failure the bond could be taken to the Federal Reserve.

71 The Court: That helps me.

I take it you have concluded your opening statement?

Mr. Bishop: Yes, sir.

The Court: Then we will suspend for a few moments while I take my motions, and you gentlemen may be at ease.

(A short recess was taken.)

The Court: All right, gentlemen. Are we ready for the defendant to make an opening statement?

Mr. Mayer: Yes.

The Court: You may point out, not by way of argument, but if there is any disagreement as to the statement made as to plaintiff's position. We will reserve the extended argument for a later time.

OPENING STATEMENT ON BEHALF OF DEFENDANT:

By Mr. Mayer:

If the court please, Mr. Bishop's statement, I think on the whole, fairly presents the issues before the court and, therefore, I will be very brief.

I will take them point by point. I will follow his order, in order to avoid confusion.

As to point 1, the reciprocal bank balances, histori-
72 cally that matter arises, the issue really arises out of the fact that the statute states that in computing deposits it shall be without any deduction for indebtedness of depositors. However, historically the deductions that the statute intended to cover were deductions of bank borrowers, and we will show that I think by the history of the statute when we come to writing briefs, that the inter-bank transactions were not the historical type of deduction that was intended.

Then we will show, the evidence will show, that under Regulation D of the Federal Reserve Board we are permitted to deduct inter-bank transactions in computing our deposits for the purpose of setting up reserves. That is

historically the manner in which banks have transacted the business among themselves, that they have arrived at a net figure when they report.

Also the evidence which we will introduce will show that the Comptroller of the Currency, in his directions to us when we make these reports of conditions to the Comptroller, which are published every so often in the press, that we show net balances in accordance with the
73 direction of the Comptroller of the Currency.

So that we claim historically we are doing it in the right manner and that we are doing it in the manner that the statute intended us to do.

As to the contract reserve, I think counsel stated that he did not know just what our position was. I think I can state our position very briefly, that is, that this reserve of ten percent is not a deposit at all; it is a withholding of ten percent to secure us against defaulted contracts which we purchase; in other words, we purchase a $100 indebtedness of A to our customer. If that customer does not pay then we charge that amount against that ten percent, and in the meanwhile our customer has no right to withdraw from that ten percent reserve account, so that it is not a balance, a deposit, within the true meaning of the statute.

The Court: You consider it as your own asset subject to being withdrawn from at a later time, if—

Mr. Mayer: If.

The Court: —if all of the payments are made?

Mr. Mayer: That is right, in the long run.

The Court: They look at it as a deposit, and you
74 say, "No, it is among our assets, but we may have to make good on it."

Mr. Mayer: If I may correct your Honor, it is a liability. In other words, the bank may have liabilities on its books other than deposit liabilities, and it is a lia-

blity, but it is a conditional liability because we have a hold on it for security. It is not such a liability as is contemplated within the meaning of the statute so as to make it a deposit, and that is in accordance with the present statute and regulations also.

The Court: What will the evidence show as to how it is dealt with so far as your bookkeeping is concerned?

Mr. Mayer: We have Mr. Curtis of the bank who will testify briefly as to just how it was handled.

The Court: I see.

Mr. Mayer: That it was handled merely as a bookkeeping memo, a memorandum account, and not treated as a deposit account, not included among the deposits of the bank.

The Court: It would not be included in one of those items for which a claim could be made in the event of the failure of a bank?

75 Mr. Mayer: I don't know, your Honor. That is not the real criterion here. The real—

The Court: I don't know. Is not the real criterion, though, whether or not they are insuring that amount? Isn't that the criterion?

Mr. Mayer: Not always, not always. The definition may be one thing in one instance, and another in another. I doubt it very much; I don't know because I don't know what their practise is. But even if their practise was to make voluntary payments on such an account that does not mean that it is a proper part of the assessment base.

The Court: That may be true.

Mr. Mayer: One does not necessarily follow the other.

The Court: Many times for business purposes or for policy reasons payments are made over and beyond the law, voluntary payments. That is sure, I will grant you that.

Mr. Mayer: If your Honor please, the evidence will

show that this account could not be drawn against and was not drawn against, so that it was not a deposit.

76 The Court: It could not be drawn against, but in the event of a failure could there be a claim?

Mr. Mayer: I doubt whether there could but, as I say, I do not think that is the governing factor.

The Court: Well, it might be one of the governing factors?

Mr. Mayer: It might be. It might be something to consider. On the other hand, they might in the instance of a failure, in order to protect the public, not raise questions which they might raise in defending. There might be questions of public policy involved and so forth in what they insure.

Next are those three or four withholding items. Mr. Bishop called those trust and agency accounts, and in doing that I think he was inadvertently distorting something somewhat, because that is the real issue, as to whether these are or are not trust and agency accounts.

The Court: If it is a trust or agency fund there is no question but what you would be liable.

Mr. Mayer: It might be a trust or agency for one purpose, as between the employer—for instance, we withhold for the sake of the Government, certain taxes, and the Government may say that we are a trustee. But

77 as far as the bank account goes we are not a trustee, because no account is set up. You see, as Mr. Bishop told your Honor, as soon as the deposits are actually made then of course it is a deposit and a part of this base. But we are talking about the time before the deposit is set up. We say that that may be a liability of the bank but that it is not a deposit. There may be any number of instances where the bank may have a liability, but they are not all deposit liabilities. A bank may contract to put up a bank building and it is liable for that, but that does not make it a deposit.

The next, and in dollars and cents at least, the most important, are these so-called cash items. As to those Mr. Bishop explained to your Honor that those were items which we received after the close of business on Friday, or possibly received on Saturday, and that we forwarded prior to the Monday base day, in general. A comparatively small part of those items, where we may have received them on the base day or before the base day but did not completely process them and did not actually dispatch them on the base day. But these
78 were things that were all deposited on the base day, and I would just like to read a sentence out of this deposit slip which is a part of the stipulation in evidence, to show the way this thing actually worked. This reads:

> "All items received for deposit or collection after regular banking hours may be deemed for all purposes to have been received for deposit or collection by the bank as of the succeeding business day, although the bank in its discretion may handle the items or put through the credit on the same day the deposit is received."

We are going to introduce in evidence briefly some facts showing the volume of these items that the bank handled, to show your Honor a part of the background as to why this was done.

One reason which does not have to be testified to is that the bank is giving good service to its customers by immediately forwarding these items as and when they are received.

The plaintiff here would admit that if we waited from Friday or Saturday until Monday to forward these
79 items that we would have the deduction; so that the result, if we do not get these deductions, is that we are being penalized for efficiency and for service, and again I say to your Honor that the history of the act,

which we will discuss in our briefs, will show that that was never intended.

From the very inception of this act there was provision made for deduction of this so-called float. Float is just what we are talking about here—items in the process of collection.

If I may digress just very briefly, I might recall that in the days when there were stockholders' liability suits and many of them in this state, some counsel took the position here that the stockholders could not be liable because this so-called float was incapable of being ascertained with exactness. Unfortunately for the counsel who took that position, the Supreme Court disagreed and did hold the stockholders liable. But this float is a difficult matter and especially so for large banks. The handling of it requires great skill, and in order to operate a bank properly they must send out these items for collection
80 promptly, and that is just what this bank did and that is what the issue is here, that when we send out items received after the close of business on the business day, that those items should be deducted because they are in the process of collection on the base day.

If your Honor please, by further stipulation there will be introduced all the regulations, both the old and the new, and the new regulations, which were adopted in 1954 by the Board of Governors of the Federal Deposit Insurance Corporation, recognize just the position we are taking now. Although those regulations upon their face purport not to be retrospective, we claim since there is no change in the statute and this is a proper and a fair interpretation of the statute, that it must have been a proper and a fair interpretation of the statute before these regulations were promulgated as well as afterwards.

There is one item included in these so-called cash items that involves I think approximately $8000, that they base

solely on a regulation which contains the word "received", "received on the base day" in the old regulation—it
81 is not in the new—but that word "received", those words "received on the base day" were not in the statute, so that to me it was just as clear as the difference between white and black that this was an attempt to change the statute, and on that particular item I do not know how they can even argue that point, because these were deposited on the base day and forwarded on the base day. The only thing is that they were received probably on Saturday or after the close of business on Friday.

That concludes my opening statement, except that I think I would like at this time to tender to counsel for plaintiff this check for $84,181.75, because we, unlike our worthy opponents, when we are wrong we are ready to admit it.

Mr. Bishop: Your Honor, I am very happy to receive it. I am only sorry we do not have the photographers here to have the picture of this taken.

The Court: All right. Let the record show the tender has been made and accepted. Naturally, that part of the complaint in due course, if there is any special mention of it, can be modified and dismissed.

82 Mr. Bishop: Yes, sir. As I stated in my opening statement, that reduces the claim to the $95,000 figure that I mentioned.

The Court; I take it it will take out certain items of your complaint, will it?

Mr. Bishop: Yes, sir.

The Court: All right.

Mr. Bishop: We had initially, I believe, eleven items that we claimed, which are now reduced to four.

The Court: In order to clarify the matter so that the record is clear, would it not be proper for those points to be dismissed or withdrawn by an appropriate written order so that we narrow the issues?

Mr. Bishop: I think, if your Honor please, we can simply do it by simply stating into the record that all claims asserted in the complaint other than the four items which I mentioned in my opening statement are withdrawn because of the concessions made by the bank and the payment that was made in open court.

The Court: Would it not be easy to cover by referring probably to paragraph 10 and go through those various items?

Mr. Mayer: Well, your Honor will have a record, because the only items in issue are those covered by
83 the written stipulation, so you won't even have to—

The Court: That will cover it then.

Mr. Mayer: Yes.

The Court: I am satisfied. I just did not want any confusion with respect to it in the event somebody is dissatisfied with my final decision here. If they want to appeal I want the issues narrowed upon which the appeal might be taken, so there will be no confusion.

Now that you have the stipulation there will be no problem.

All right, you may proceed with your evidence. I suppose you will probably want to proceed with the stipulation further, the reading of it? Is there any objection to it, is it a complete stipulation?

Mr. Mayer: It is complete so far as it goes, of course.

The Court: May it then be received in evidence here and handed to me, and let me look it over, and I think it will be helpful to me in following the testimony. Give it to the reporter and mark it I suppose, as Joint Exhibit A.

Mr. Bishop: The stipulation itself has certain ex-
84 hibits attached to it which are marked Exhibits A, B and C.

The Court: Then make it Joint Exhibit 1.

Mr. Bishop: So I would suggest we simply file it, and not designate it as an exhibit.

The Court: All right. It may be filed as a stipulation and treated as a transcript of evidence.

Mr. Bishop: Yes, sir. All right. Let the record now show that I have filed the stipulation which has been signed by counsel for both parties, as a part of the stipulated facts in this case.

The Court: All right. The clerk is directed to file it.

Mr. Bishop: I will ask that this witness be sworn, if your Honor please.

(Witness sworn.)

The Court: Will you bear with me just a minute, gentlemen, while I look through this stipulation? I think it will help me while I follow the testimony. I will not read it in detail.

All right. I have reviewed it sufficiently to acquaint myself with the general claim. You may proceed.

Mr. Bishop: Your Honor, at this time I would like to offer in evidence the Senate Committee Report
85 at the time of the adoption of the 1950 amendment to the Federal Deposit Insurance Act. I think technically the courts would take judicial notice of it, but so that we may have it in the record I think it is advisable—

Mr. Mayer: There is no objection.

Br. Bishop: —to offer both the House Committee Report and the Senate Committee Report.

The Court: You may mark them as what exhibits?

Mr. Bishop: The Senate Committee Report is to be marked Plaintiff's Exhibit 1 and the House Committee Report as Plaintiff's Exhibit 2.

The Court: Those are received.

(Said documents, so offered and received in evidence, were respectively marked Plaintiff's Exhibits 1 and 2.)

Mr. Bishop: I would like also to state that if it becomes necessary to make up a record for the Court of Appeals or the Supreme Court on this, we will incorporate in the record only those pages that may be designated by either side, because there is a lot of extraneous matter in there that we would not want to be included in the transcript if we went up. Is that agreeable?

Mr. Mayer: Yes. Frankly, I am going to refer to
86 other Senate and House Reports, but I assumed that the court takes judicial notice of those. I was not going to offer those in this record.

The Court: I think there is no question about my taking judicial notice of them. I do not think they are required to be in evidence. However, it would be very nice to have them available, and I think it might be better not to offer them as exhibits on that very question of encumbering the record, making the record larger. You will then be free to refer to anything which the court could take judicial notice of without incorporating the whole instrument into the record. But if it is offered with that understanding, that only such pages may be designated, that is all right. They may be received.

A. E. ANDERSON, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bishop.

Q. Will you state your name, please?
A. A. E. Anderson.
Q. Where do you live, Mr. Anderson?

A. Arlington, Virginia, a suburb of Washington, D.C.

87 Q. And by whom are you employed?

A. The Federal Deposit Insurance Corporation.

Q. For how long a time?

A. Since March of 1938.

Q. Prior to the time you went with the Federal Deposit Insurance Corporation in what business were you engaged?

A. I was in the banking business and working for the Iowa State Banking Department as examiner in charge of closed banks in Iowa.

Q. Prior to that time will you just state briefly what your education was?

A. After finishing high school I attended the University of Iowa for two years and then one year at New York University in business and finance.

Q. When you first went with the Federal Deposit Insurance Corporation what branch or division of that corporation were you employed in?

A. I was in the liquidation division.

Q. Whose function is what?

A. The liquidation of assets, the converting into cash of assets received from banks that have gotten into difficulties, and if necessary for the corporation to purchase their assets or make loans to them.

Q. What particular duties did you perform in con-
88 nection with the liquidation division?

A. I was liquidator in the field for about two years until 1940, and then I was brought into the main office in Washington, and I was principal supervising liquidator in charge of supervising liquidation of assets in the field.

Q. Then from that employment what branch were you transferred to?

A. In about April of 1946 I was transferred to the division of accounts.

Q. And briefly what were your duties there?

A. One of the sections of the division of accounts was the assessment section and I was chief of the assessment section, which has to do with the collection of assessments from banks.

Q. Will you explain to the court what your duties were as chief of the assessment division?

A. The main duty was the collection of assessments from the approximately 13,600 banks.

Q. How long did you remain in that capacity?

A. I remained in that until 1953 when the title was simply changed to fiscal agent under the reorganization of the F.D.I.C. and the assessment branch then became
89 one of the four branches under the Comptroller.

Q. And what were your duties as fiscal agent?

A. They were substantially the same as when I was chief of the assessment section, except that thereafter all letters to insured banks and so forth went out over my own signature.

Q. Would you say that during that period of time you were the chief administrative officer of the Federal Deposit Insurance Corporation with reference to the assessments and collection of assessments?

A. Yes, sir.

Q. Directing your attention, Mr. Anderson, to the question involved in this lawsuit of reciprocal bank accounts, reciprocal bank balances, will you tell us what your experience has been in connection with the administration of the act relating to those bank accounts?

Mr Mayer: That is objected to as being too broad, and as being immaterial.

The Court: Read that, Mr. Reporter.

Mr. Bishop: Well, I will withdraw the question and I will approach it in a little different manner.

90 Q. When you first became chief of the assessment section did you examine the files and records of the Federal Deposit Insurance Corporation insofar as they pertained to reciprocal bank accounts, bank relationships?

A. Yes, I did.

Q. Will you tell the court what you did in that respect?

A. I of course read the law over very carefully and the rules and regulations, and then I reviewed all of the records that I found in the assessment section relating to that subject, and I went further and prepared a file under that classification, as I did on all other classifications of deposits and deductions, in which I inserted all legal opinions we had received up to that time and also specimen letters which had been sent to banks with respect to that subject.

Q. And that covered what period of time?

A. Well, from the beginning of the permanent insurance law, 1935.

Q. And down to 1946?

A. Yes, sir.

Q. Subsequent to 1946 were the records of the

91 Federal Deposit Insurance Corporation relating to assessments on reciprocal bank relationships kept under your direction and supervision?

A. Yes, sir, they were.

Q. And were they kept in the ordinary course of business?

A. Yes, sir.

Q. And were the records that were kept there voluminous in character?

A. Oh, I wouldn't say much, no, not too great.

Q. Well, have you made a study of the records since—

The Court: What he wants to know is whether they are too voluminous to drag in here before the court.

The Witness: No, they are not.

By Mr. Bishop:

Q. Do you have them with you?

A. Yes, sir.

The Court: You have not laid a very good foundation for a summary.

Mr. Bishop: I was going to skip that and let your Honor and Mr. Mayer get into it if you wished.

92 The Court: I think you might approach it a different way, that the court might understand if better if you summarized it than if you brought in the records and laid them on the table.

Mr. Bishop: I am coming to the summarization, if your Honor please.

The Court: All right.

Mr. Bishop: We are not concerned with the summarization. What I am seeking to lay a foundation for is to develop the policy of the corporation administratively with respect to the act, and I am trying to show his experience.

Mr. Mayer: I want to object to the entire line on the ground that what they did internally is not binding on anyone, it is not binding on this defendant.

The Court: They might even have promulgated the wrong rules and they might even have applied them incorrectly. However, in order for me to understand this correctly, to determine whether they did do it or not, I think I ought to know those rules they have pro-

93 mulgated, what their policy has been, so I will overrule the objections and you may proceed.

Mr. Bishop: There is no secret about what we are seeking to do, your Honor. We claim that the regulation or statute administered by an administrative agency that is consistent over a long period of time and acquiesced in by the public, that their interpretation in the administra-

tion of it has a very great weight with the court, and that is what I seek to show.

The Court: Well, I have already ruled that you may show it anyway.

Mr. Bishop: I did not mean to argue with your Honor's ruling with me. I simply wanted you to understand what I was driving at.

Mr. Kohn: We just want to object to whatever the public may have done. As far as we are concerned this is a matter that relates to a bank and we are not bound by it.

The Court: I still think I ought to hear it. All right. Objection overruled.

94 We will hear it and then I can determine whether or not the parties are bound by it.

All right.

By Mr. Bishop:

Q. We were talking, Mr. Anderson, about your experience in handling assessment for the corporation insofar as they pertain to reciprocal bank accounts or reciprocal bank relationships. From that experience, and as the administrative officer of the corporation in charge of collection of assessments, do you know the policy that the corporation has followed since its inception in the administration of the statute with reference to reciprocal bank accounts?

A. Yes, sir, I know.

Mr. Mayer: That is objected to; I move to strike out the answer.

The Court: Oh, it is qualifying him to testify. Objection overruled.

By Mr. Bishop:

Q. What was that policy?

The Court: The answer may stand.

Mr. Mayer: I object to that as not binding on this defendant. There is no showing by this question that
95 he is seeking to show what the rules were that were made public to us. He is just talking about some policy which might have been a private policy, for all I know.

The Court: It might have been, but he is qualifying this man to testify concerning the same, and I suppose those questions will ultimately be asked.

The answer may stand. Proceed with further questions.

Mr. Bishop: Will you read the question, please?

(The last question was read by the reporter.)

The Witness: All insured banks were required to include in their assessment base, without any deduction or exclusion of any kind, their reciprocal bank balances; in other words, they had to include in their assessment base all deposits in the bank, even though they are due to a bank with which they have a reciprocal relationship.

Q. Without deducting the deposit of the reciprocal
96 bank with the reporting bank?

A. That is right. They could not deduct it or exclude it.

The Court: That is what the policy was before; that does not having anything to do with what the policy now is and with what is issue, does it?

Mr. Bishop: The question covered the period from the inception of the act down to now, your Honor.

The Court: Down to now or down to 1950?

Mr. Bishop: Down to 1950.

The Court: Down to 1950.

Mr. Bishop: Down to the amendment of the act that policy was in effect.

Q. Is that right?

A. That is right.

The Court: Down to when?

Mr. Bishop: The amendment of the act in September, 1950.

The Court: Yes. Our situation deals entirely since that time, is that right?

Mr. Bishop: Before that time. I think in my opening statement I inadvertently gave your Honor the wrong
97 period.

Mr. Kohn: You said 1951 to 1953.

Mr. Mayer: It is really 1948.

Mr. Bishop: The period covered is prior to the 1950 amendment to the act. I thought at the time I had given you the wrong period, and I stand corrected.

The Court: All right. Now I understand it.

By Mr. Bishop:

Q. Do you know, Mr. Anderson, whether the insured banks all over the country have paid assessments in accordance with the policy which you have just enunciated?

Mr. Mayer: I object to that. What other banks do cannot possibly be binding on this defendant.

The Court: Well, he is offering it solely to show—in support of his argument.

Mr. Bishop: To show acquiescence by the public, your Honor.

The Court: I will receive it in that limited capacity. It is still not binding on you, but it might tend to help the court comprehend the problem. It may be ad-
98 mitted for that limited purpose. You may answer.

The Witness: Yes, sir, they have, until the inception of the 1950 act, when the law was changed.

The Court: Your answer is that they have generally. You would not know but that maybe this bank or that bank, including the defendant here, interpreted it in accordance with the plan that was followed, the scheme that was followed by the defendant, would you?

The Witness: Your Honor, my answer is based upon our office review of certified statements that are submitted to the corporation.

The Court: Do you think this is the only instance in which it was not observed?

The Witness: May I just finish what I started to say there?

The Court: Yes, go ahead.

The Witness: But we have made field audits of the assessment records of the larger banks, and to date we have made around 2,000 of these field audits.

The Court: Two thousand of the thirteen thousand 99 and some?

The Witness: Yes, roughly that, your Honor, and in all of these audit reports that were made until about 1949, when I happened to make a review of the certified statements that had been submitted up to that time, I mean the audit reports that had been submitted, we only found about sixteen exceptions, and all those have paid. We know for sure that no banks have deducted them on the certified statements, the ones we made office reviews of, because it would be shown on the certified statement if they did.

On the others, as far as we can tell, there have been no exclusions, and we can tell pretty well in all the smaller banks and, as I said, the field audits were made in the larger banks.

Mr. Mayer: If your Honor please, I move to strike the testimony of this witness on the further ground that he has now stated that out of 13,000 banks he has only dealt with about 2,000 in these statements, and all 100 the other 11,000 might be doing just the reverse.

The Court: It may stand for what it is worth. It amounts to cross examination. I did not mean to make it in the form of cross examination, but it makes the testi-

mony of the witness more clear as to what it does apply to. It applies to the 2000 less 16, and the 16 have now paid up, and the 17th one was this one?

The Witness: Yes.

The Court: Well, just so I clearly understand it.

By Mr. Bishop:

Q. Mr. Anderson, if it came to your attention as the administrative officer in charge of assessments, that a bank was taking deductions for reciprocal accounts, did the corporation require that bank to pay by excluding that deduction?

Mr. Mayer: That is objected to, I think, both in form and substance.

The Court: The form may be a little bad, but I think he may answer it. Objection overruled. What they 101 required them to do might not be binding on you, but it is going to help me in this matter. There is no jury here, so he may answer.

The Witness: Yes, sir, they certainly would.

Mr. Bishop: I would like to offer in evidence at this time, unless there is some question about it, these two letters.

Mr. Mayer: Would you like the original?

Mr. Bishop: No.

Mr. Mayer: I object to the exhibits because I think they are immaterial and they are merely self-serving. They say we were doing something wrong, and that is a question for the court to decide.

(Said documents were respectively marked Plaintiff's Exhibit 4 and 5, for identification.)

Mr. Mayer: I admit the defendant received Plaintiff's Exhibit 4, there is no question about that, and—

Mr. Bishop: And that you sent Plaintiff's Exhibit 5?

Mr. Mayer: That is correct.

Mr. Bishop: I would like to offer in evidence Plain-
102 tiff's Exhibits 4 and 5, being letters dispatched to the Continental Bank and received from the Continental Bank in 1937, relating to the method of handling the reciprocal bank accounts. As I understand it from Mr. Mayer, he does not require me to lay a foundation for these.

Mr. Mayer: No, Mr. Bishop.

The Court: And your objection was based on what?

Mr. Mayer: That they are immaterial and self-serving.

The Court: Objection overruled. They may be admitted.

(Said exhibits, so offered and received in evidence, were respectively marked Plaintiff's Exhibits 4 and 5.)

By Mr. Bishop:

Q. Mr. Anderson, I show you what has been marked Plaintiff's Exhibit 3 for identification. Did you have any part in the preparation of the material that is included in that exhibit?

A. Yes, sir, I did.

Q. Will you describe briefly to the court what
103 you had to do with it?

A. I had the large share of the preparation of those instructions to insured banks, the writing of them.

Q. And was that done about the time that the exhibit shows the date, December, 1950?

A. Yes, it was done during that month of December, 1950.

Q. Will you describe to the court how an insured bank makes its report to the Federal Deposit Insurance Corporation with reference to computation of its assessments?

A. Yes, sir. Each bank is required to file a report with the Federal Deposit Insurance Corporation, which

we call the certified statement, on which it shows its total of deposit liabilities for assessment purposes and on which it shows its eligible deductions, and it arrives at a net balance, which is divided by the number of days in the period, which was 181 to 184 under the old law, and which is only two under the new law; and that is then known as its assessment base, and it is shown on the statement, and then they show on the statement the amount of its assessment, and then they pay with the certified statement the amount of assessment due to
104 the corporation less any credit it might have on our books.

Q. Was this Plaintiff's Exhibit 3 prepared in connection with the method of preparing and filing the certified statement that you referred to?

A. Would you be good enough to have that repeated?

Mr. Bishop: Strike it out.

Q. This Plaintiff's Exhibit 3 for identification, which you have identified, to what does that relate?

A. It relates to the filing of certified statements under the 1950 act.

Q. After the preparation of it do you know whether this document was forwarded to all insured banks?

A. Yes, sir.

Mr. Bishop: I now offer that in evidence as Plaintiff's Exhibit 3.

The Court: Counsel, have you seen it?

Mr. Mayer: Yes. I object merely on the grounds of immateriality.

The Court: It may be received.

(Said exhibit, so offered and received in evidence, was marked Plaintiff's Exhibit 3.)

105 By Mr. Bishop:

Q. Mr. Anderson, in what Federal Reserve District is the Continental Bank located?

A. It is in the Seventh Federal Reserve District, Chicago being the main office.

Q. What do you mean by the Federal Reserve time schedule?

A. That is the schedule put out by each Federal Reserve Bank showing the time that they require for the collection of cash items. In other words, it gives the availability date of items sent to it for collection.

Q. Will you explain that a little more fully so that the court understands what we are talking about?

A. Yes. The schedule classifies different types of items, such as Government checks, which I believe are immediately available, and items drawn on certain cities which are available in one day, others in two days, others in three days, and in the old time schedules there were three business days or three calendar days. So that after the expiration of that time a bank forwarding items to the Federal Reserve Bank can consider that they have collected funds after the expiration of that time.

106 Q. Taking an illustration, if the Continental Bank had a check drawn on Seattle which it sent to the Federal Reserve for clearing, there would be a lapse of time between the date it was forwarded to the Federal Reserve and the time when the Continental actually got credit for that item, is that correct?

A. That is right.

Q. And in the case of the illustration I have used, that would be what, two or three days?

A. Well, it used to be three days. I think at present it is two days.

Mr. Bishop: Will you mark this for identification as Plaintiff's Exhibit 6?

(Said document was marked Plaintiff's Exhibit 6 for identification.)

By Mr. Bishop:

Q. I show you what has been marked for identification as Plaintiff's Exhibit 6, and I ask you if that is the Federal Reserve time schedule that was in effect at the time the Federal Deposit Insurance Act was amended in 1950. I will change that question. I don't believe that is the right one. We have the wrong one.

Mr. Mayer: What is the materiality or relevancy
107 of this? I thought this was agreed to in the stipulation?

Mr. Bishop: Well, it has to do with the interpretation of cash items, the application of the method.

I marked the wrong the one, your Honor. I am sorry.

(Another document was marked Plaintiff's Exhibit 6 for identification, in lieu of the document originally so marked.)

By Mr. Bishop:

Q. This new exhibit marked Plaintiff's Exhibit 6 for identification is the one that was in effect in September of 1950, is that correct?

Mr. Mayer: This says January 1, 1950, the one you gave me. Is that right?

Mr. Bishop: That is right.

Q. What is your answer, Mr. Anderson?

A. This one is dated January 1, 1950. Our law was enacted December 21, 1950, and I am confident that this is the one that was then in effect, but I cannot say positively that they did not issue one between January 1, 1950 and September 21, 1950.

108 Mr. Bishop: I offer that in evidence, if your Honor please.

The Court: It may be received.

(Said exhibit, so offered and received in evidence, was marked Plaintiff's Exhibit 6.)

By Mr. Bishop:

Q. Mr. Anderson, you have already testified as to your familiarity with the method followed by the corporation in handling collections of assessments relating to reciprocal bank relationships. Directing your attention to assessments with reference to deductibility of cash items, is your experience there substantially the same as that you have testified to with reference to reciprocal accounts?

A. Yes, sir, it is.

Q. Would you say there also that you were the chief administrative officer of the corporation with reference to assessments relating to cash items or the deductibility of cash items in determining assessments?

A. Yes, sir, I was.

Q. Will you describe the method that is followed in the reporting by insured banks of the deductibility 109 of cash items?

Mr. Mayer: I object to that as not being binding on the defendant and being too general.

Mr. Bishop: It is a preliminary question, if your Honor please.

The Court: It may stand for that reason.

The Witness: Under the 1950 law there were two methods provided for claim deductions for cash items. The first of these is known as the AA method, under which a bank may deduct from its reported deposits, multiplied by two, the cash items received on the assessment base days, which are forwarded for collection on those days and held for clearings at the close of business on those days.

Mr. Mayer: I want to interrupt the witness here and object—

The Court: That is what you stipulated to.

Mr. Mayer: He is merely reciting what is in the stipulation.

The Court: I read that in the stipulation, but it may stand. It is not helpful particularly, but maybe as a preliminary question it is worth something. Go ahead.

110 Mr. Bishop: We are coming to the question of the administrative action of the corporation with reference to the statute and the regulations.

The Court: Well, it is stipulated that you followed the AA method.

Mr. Mayer: That is right.

The Court: Go ahead.

The Witness: Under the other method, known as the BB method, the bank may deduct exactly the same items, but they may not multiply them by two; but, in addition, they may deduct the uncollected items paid and credited on preceding days and forwarded for collection on preceding days that remain uncollected at the close of business on the base day.

In other words, the bank has the choice of the two methods. If it follows the simple formula it can multiply eligible items by two. If it chooses it may use the other method under which it can deduct all uncollected items.

By Mr. Bishop:

Q. How does the Federal Reserve time schedule that you have identified enter into the application of the two methods that you have described?

111 A. Well, under the BB method the Federal Reserve time schedule limits the time and item may be considered as uncollected to be eligible for deduction. Under the AA method it does not apply.

Q. To compensate for that under the AA method what was done?

A. Well, to compensate for the uncollected items that are not eligible for deduction under the AA method the bank was permitted to multiply the eligible items that fall within the formula by two.

Q. How did you happen on the number of two?

A. Well, the Federal Reserve time schedule—

Mr. Mayer: I object to this, your Honor. This is not anything of record. This witness is merely giving his impressions. I do not think he is qualified to give reasons for this.

The Court: Well, I was just thinking the same thing, but let us let him answer. It may be helpful to me in understanding the general problem. However, it is not binding in any way. He may answer.

The Witness: Under the Federal Reserve time
112 schedule the availability of items was one, two and three days, plus time of forwarding. The banks had complained that it was quite a job—

Mr. Bishop: You can't tell what the banks complained of.

The Witness: I am sorry. We arrived at a mean average of two days, figuring that was the length of time required to collect on an average, and permitted the banks to multiply by two.

By Mr. Bishop:

Q. During the period of time that you have been chief of the assessment section and fiscal agent has the corporation administered the statute and the regulations to permit banks to deduct cash items received prior to and forwarded prior to the base days?

Mr. Mayer: That is objected to again as calling for the conclusion of the witness, including immaterial matter and matter that might be entirely secret and not in any way binding upon this defendant. He is not putting in rulings or regulations. He is telling how they inter-
113 nally administered the act.

Mr. Bishop: That is exactly what I am trying to prove.

The Court: Objection overruled. He may tell. He is telling the practise which is followed.

Mr. Bishop: That is right.

The Court: I think I should know that.

Mr. Bishop: That is right.

The Court: I may find the practise was wrong, but I think I am entitled to hear what the practise was.

The Witness: Prior to the March 30, 1954 amendment, it has not.

Mr. Bishop: Has the corporation permitted deduction of cash items received prior to the base day and forwarded on the base day?

The Court: Pardon me just a second. Of course, the amendment changes that and since that time you have?

The Witness: Yes, sir.

Mr. Bishop: I am sorry, your Honor.

The Court: That is all right. I just want to get one point very clear.

114 Mr. Mayer: That is talking about the amendment to the regulations.

Mr. Bishop: In 1954.

Mr. Mayer: The new regulations.

The Court: That is right. He stated the specific time.

Mr. Mayer: I thought it might be confusing merely to talk about amendments without specifying.

The Court: Regulations, I understood.

Mr. Bishop: That is right. I withdraw the question I was asking and put it again.

Q. Has the corporation permitted deduction of cash items received prior to the base day and forwarded for collection on the base day?

Mr. Mayer: Same objection.

The Court: Same ruling. He may answer.

The Witness: It has not prior to the March 30, 1954 amendment to the regulations.

By Mr. Bishop:

Q. Has the corporation permitted deduction of items

received on the base day and forwarded for collection subsequent to the base day?

Mr. Mayer: Same objection.

115 By Mr. Bishop:

Q. Prior to the 1954 amendment to the regulations?

The Court: Overruled. He may answer.

The Witness: It has not.

By Mr. Bishop:

Q. Do you know whether the insured banks throughout the country have paid in connection with the administrative decision as you have related it?

Mr. Mayer: Same objection.

The Court: Same ruling, you may answer.

The Witness: Yes, sir.

By Mr. Bishop:

Q. Have they or have they not paid it?

A. They have paid on that basis with the exception of two banks where they have deposited security with us. Those two banks know of this Continental case and have asked that the payment be deferred until this case is settled.

Q. Mr. Anderson, do you know whether there is a definition in the statute of what we term a base day?

A. Yes, sir, I know.

Q. Is there one?

A. No, sir.

116 Q. Prior to the 1950 amendment to the F.D.I.C. statute was there any such thing as a base day other than the business day?

Mr. Mayer: That is objected to as calling purely for the opinion of this witness.

Mr. Bishop: I will withdraw the question.

The Court: If there is such a regulation you want to present it.

Mr. Mayer: Counsel and I are going to agree on all

the regulations so your Honor may have the benefit of those.

The Court: Objection sustained. Well, it is withdrawn.

Mr. Bishop: I will withdraw it.

Q. Did the 1950 amendment provide for two base days in each semiannual period?

A. Yes.

Mr. Mayer: I object to that. The statute speaks for itself.

The Court: Of course, the statute speaks for itself. Objection sustained because the court will take judicial notice of the statute. His opinion could hardly change it.

117 By Mr. Bishop:

Q. Mr. Anderson, did you have any part in the discussions that took place with the banks and with the American Bankers Association prior to the promulgation of the 1954 regulation?

Mr. Mayer: I object to that.

The Court: Oh, he is trying to go into the historical background, I suppose.

Mr. Bishop: I propose to show, if your Honor please, that the 1954 amendment to the regulations was brought about as the result of the insistence of banks over the country, not for the purpose of clarifying the existing regulation or clarifying the statute, but for the specific purpose of meeting changed conditions in the banking industry. I think it is highly important—

Mr. Mayer: That is a matter for argument, your Honor, and not a matter for testimony by a witness.

Mr. Bishop: I think the background is very illuminating as to what happened.

Mr. Mayer: Unless he wants to bring in all of the people who were present, and then we can get into 118 all kinds of arguments.

Mr. Bishop: As to this one instance, Mr. Mayer,

your bank was actually present and participated.

Mr. Mayer: I don't think it is material or relevant.

The Court: I think we are going far afield. However, I will let him answer.

The Witness: Yes.

By Mr. Bishop:

Q. I asked whether you participated. You did participate?

A. Yes.

Q. Do you know how the question regarding the amendment of part 327 of the regulations insofar as it related to the definition of the base day first came about?

Mr. Mayer: That is objected to.

The Court: Oh, same ruling. I think it is going far afield, but he may answer.

The Witness: Yes.

The Court: It may stand.

By Mr. Bishop:

Q. Will you describe that?

119 Mr. Mayer: Objection.

The Court: Overruled. He may describe that.

Mr. Bishop: May the record show the same objection to all the questions and answers?

The Court: All right.

Mr. Kohn: We might have different grounds, if your Honor please.

The Court: If you have no different grounds it may stand that you object to each question along this line, and that the objection is overruled. Naturally, it is another matter if you have additional grounds.

Mr. Bishop: Will you read the question to the witness?

(The last question was read by the reporter.)

Mr. Mayer: I want to make an additional objection, that it is an improper question, one which calls for a conclusion.

Mr. Bishop: It does not call for any conclusion. I am asking if he knows how the discussion first started. That calls for no conclusion.

120 Mr. Mayer: Are you asking for the discussion or what are you asking for?

Mr. Bishop: I will ask him that just as soon as I ask him whether he knows or not.

The Court: He may answer. Objection overruled.

The Witness: Yes.

By Mr. Bishop:

Q. Will you describe how—

Mr. Mayer: The same objection there in addition to the last grounds.

The Court: The same ruling. He may answer.

By Mr. Bishop:

Q. Will you describe how the discussions originated, what the discussions were, what your participation in them was, and what the participation of Mr. Cordes of the Continental Bank was?

Mr. Mayer: Same objection.

The Court: Same ruling. I presume there is one there —there has not been the question of whether or not the Continental Bank was present, so—

Mr. Bishop: I am simply trying to shorten it, 121 Judge. I could take them question by question.

The Court: There is no question that—

Mr. Mayer: Oh, our man was present.

The Court: All right. I wanted to be sure that there was no objection on that point.

Mr. Mayer: No.

The Court: All right. It is overruled, if it is understood that your representative was there.

The Witness: A few of the banks had objected to the disallowance as deductions for cash items under the AA method of items received prior to the base day or items

forwarded after the base day, and at least one of these banks presented the matter to the American Bankers Association and asked that they confer with us.

The American Bankers Association appointed a committee on F.D.I.C. assessments to confer with us, to confer with the corporation, and this committee did meet with representatives of our corporation, and that
122 committee included Mr. Philip Cordes, Assistant Comptroller of the Continental Bank.

By Mr. Bishop:

Q. When did that meeting take place?

A. It was in March of 1954.

Q. And whereabouts?

A. In the directors' room of the Federal Deposit Insurance Corporation.

Q. In Washington?

A. In Washington, yes.

Q. Will you state the substance of what was said by the representatives of the bank and what was said by the representatives of the corporation with reference to the amendment of part 327 of your regulations, which is the amendment relating to definition of the base day?

A. The representatives of the bank said that they had three items that they wanted to take up with us, and one of these was the question of holdovers. In other words, the deduction as cash items of items received prior to the base day and forwarded prior to the base day or received and carried over and forwarded on another day. And they asked that the base day be defined so as to include as deductions for cash items all items received
123 after the close of the books or close of business on the day preceding the base day to the close of the books or the close of business on the base day, and that all cash items entered on the books of the bank on the base day be eligible for deduction.

Q. What was said by representatives of F.D.I.C. in answer to that request?

A. We said that our use of the calendar base day as we had done in the past appeared to be proper and that some of our people felt it should be continued. However, we were willing to listen to the banks on what they wished to recommend, which was why we were there, and that we contemplated changing the definition, putting in a definition of base day so that such items would be eligible for deduction in the future.

Q. Subsequent to that was the regulation amended in accordance with that request?

A. It was.

Q. And that is the regulation that was promulgated in 1954?

A. That is right.

Q. Was anything said at that conversation regard-
124 ing the retroactivity of that regulation?

Mr. Mayer: That is objected to, both on the grounds stated before, and that it is leading and suggestive.

The Court: It is leading and suggestive, but he may answer. Objection overruled.

The Witness: Yes. It was said that the new regulation would have to be effective from that date.

Mr. Mayer: Who is talking now?

By Mr. Bishop:

Q. Who said it? Were you talking then?

A. Specifically I was, yes, and I stated that the regulation would have to be effective from that date on because it would be chaotic to change it for the past with respect to some 13,000 banks.

Q. Well, was Mr. Cordes there at that time?

A. He was.

Q. Is that the gentleman sitting over here at the right-hand side?

A. No, sir. That is Mr. Curtis.

Mr. Bishop: Off the record, your Honor, they have a Mr. Cordes and a Mr. Curtis, and I have been at this about a year and I still don't know which one is which.

At this time, if the court please, I would like to
125 call the court's attention to the publication in the Federal Register of the promulgation of the regulations in 1950 and in 1954. I do not believe it is necessary to offer them in evidence, but, as I understand the rule, in order for the court to take judicial notice of them we must call it to the court's attention at the time of the hearing, and I would now like to call the court's attention to Volume 15 of the Federal Register, pages 7724 to 7728, which contain the notice of rule-making prior to the adoption of the 1950 regulations; to 15 Federal Register 8628—

Mr. Mayer: Mr. Bishop, if it will save time you and I can agree that these regulations went into force on the date they bear, the 1950 and the 1954's were promulgated, as far as I am concerned—

Mr. Bishop: I am through with that now.

Mr. Mayer: That proper notice was published.

Mr. Bishop: In other words, we want to prove that there was proper notice,—

The Court: He has conceded it.

126 Mr. Mayer: I concede it.

Mr. Bishop: That the rule-making publication showed the proper notice and so on.

Mr. Mayer: I do not concede that all the regulations were proper. That one I think was outside the statute, but proper notice was published, and I do not raise any question about that.

Mr. Kohn: You are not offering those in evidence, you

are just calling them to the attention of the court, is that it?

Mr. Bishop: I do not have to offer them in evidence, if I understand the rule.

Mr. Kohn: That is right.

Mr. Bishop: We agree on that, do we not?

Mr. Kohn: That is right.

By Mr. Bishop:

Q. After the publication of the Federal Register notices in 1950 and 1954 did you, as the officer in charge of assessments, receive any objection from the Continental Bank as to either the 1950 regulations or the 1954 regulations?

Mr. Mayer: That is objected to. We do not have to make objections. We can take the position in this court that the rules are invalid or improper, without
127 objecting at the time of publication, so I think the question is improper and I object.

The Court: And the fact that they did make an objection would not enhance their position either, would it?

Mr. Bishop: I think it would have, especially when they are talking about the retroactivity.

The Court: I know, but I cannot see how it would have made any difference if they had objected. It seems to me if your regulation is sound it would not have made any difference if they did not want to comply with it, they would have just the same objection. Objection sustained.

Mr. Bishop: I am not sure whether Plaintiff's Exhibit 6 was admitted or not. I believe it was.

Mr. Mayer: I think it was.

The Court: Yes.

Mr. Bishop: I think that is all, your Honor.

The Court: You may cross examine.

128 *Cross Examination by Mr. Mayer.*

Q. Mr. Anderson, when you stated that the banks have paid without deduction for these reciprocal items, you are only talking about the 2000-odd banks that you have audited, isn't that so?

A. No.

Q. You don't know of your own knowledge that the other 11,000 which you have not audited have paid without deduction, do you?

A. I think I made it clear to his Honor—

Q. Would you just answer that question? Do you know of your own knowledge whether the other 11,000 banks which have not been audited made any deduction on account of reciprocal balances?

A. Yes, sir, I know.

Q. How do you know if they have not been audited?

A. Because the certified statements have a space for deductions, and if they had deducted it we would have seen it on the certified statement. If they had deducted reciprocal bank balances we would have seen it.

Q. Do you know that the Continental Bank has continued all these years to make that deduction?

A. They have not continued to make the deduction
129 all these years. What they have done is excluded it from the base where we couldn't see it.

Q. All right. Let me reframe my question.

The Court: What counsel wants to know is whether some other bank might not have done the same thing.

By Mr. Mayer:

Q. Then you don't know whether all the other 11,000 banks might not have excluded it, if you want to put it that way, is that correct?

A. We can tell pretty well with respect to the smaller banks whether they have made such an error.

Q. But you don't know with respect to the larger banks, is that right?

A. We have made field audits of the 500—

Q. Wait a minute. Let us just answer the question.

A. All right.

Q. With respect to the larger banks among the 11,000 which you have not audited, do you know whether they have, or a great number of them have excluded for reciprocal balances?

A. Yes, I know.

Q. How do you know?

A. We made field audits of the larger banks.

130 Q. Of all of them?

A. We have made field audits of all of the 500 largest banks and we have made field audits in a large share of the 900 largest banks.

Q. But there are a number that you have not made field audits with respect to, is that right?

A. Yes, sir. In the—

Q. So there might still be a substantial number of banks who have excluded in the same manner as Continental, is that right?

A. I don't think it is.

Q. Well, you are guessing about that, aren't you? I am asking you what you know. For all your personal knowledge there might be a substantial number of banks that have made exclusions, isn't that correct? From your personal knowledge?

A. I can't say that there would be. I don't think there are many.

Q. You don't know.

A. Yes.

Q. All I am asking you is, do you know or don't you know?

The Court: Let us ask it this way. He is now giving an opinion based on what he believes are statements
131 that lead him to that conclusion, he does not personally know. Is that right?

By Mr. Mayer:

Q. Is that correct, Mr. Witness?

A. That is right, your Honor.

The Court: All right. That is my understanding of his testimony.

Mr. Mayer: Yes.

Q. Mr. Anderson, I believe you said that this time schedule which is Plaintiff's Exhibit 6 does not affect the banks under the AA method, is that right?

A. That is right, under the regulations in effect to March 30, 1954.

Q. Do you recall that when you audited the Continental Bank recently that because of the fact that we use the Federal Reserve Bank to collect a large number of items for us and we examine the time schedule, that we concluded that there were funds available and that changed the amount and that was why we admitted a large amount was due that we had thought was not due, do you recall that?

A. Those were disallowed because they were col-
132 lected, Mr. Mayer.

Q. Because of this time schedule, wasn't it?

A. Those were items I am confident that were immediately available, so we could tell from the time schedule or otherwise that they were already collected.

Q. That is all I wanted to know. So that the time schedule does have some effect on the AA method too, doesn't it?

A. Under the AA method only the uncollected items received on the base day that are in the process of collection.

Q. Will you just answer my question?

A. All right, I will try.

Q. My question is, doesn't the time schedule have some effect on a bank when it uses the AA method and uses the Federal Reserve Bank?

A. It does—

Q. All right, that is the answer.

A. —if you refer to uncollected items.

Q. That is what we were referring to, of course.

A. All right.

Mr. Mayer: That is all.

The Court: Is there any redirect examination?

133 Mr. Bishop: Just a couple of questions.

Redirect Examination by Mr. Bishop.

Q. By the 500 largest banks, what do you classify in the 500 largest banks?

A. Those are banks with deposits I believe in excess of about 85 or—about seventy-five or eighty million dollars in deposits. I can't say absolutely, but I am quite confident that is about the size that goes down to the 500.

Q. And would the 26 banks that the Continental Bank maintained reciprocal relationships with fall within that 500?

A. Yes, I am sure that they all would.

Q. Mr. Mayer asked you whether you could tell whether or not reciprocal deposits were deducted or excluded from deposit liabilities. Will you tell the court how the Continental handled it after the receipt of the letter marked Plaintiff's Exhibit 4?

A. After receipt of this letter they excluded from the reported deposits on the certified statement the amount

of the reciprocal balances, instead of deducting it
134 on the certified statement. In other words, they omitted it from the reported deposits opposite item A on the certified statement.

Q. And then did not show it as a deduction?

A. That is correct.

Q. But they got the benefit of it by the other method?

A. Yes, sir.

Mr. Bishop: That is all.

Recross Examination by Mr. Mayer.

Q. Mr. Anderson, it is perfectly clear to any auditor who examined our old reports and the new ones, that we were taking it as an exclusion rather than as a deduction, wasn't it?

A. Yes, it was obvious.

Mr. Mayer: That is all.

Mr. Bishop: May I have just a moment, your Honor?

The Court: Yes.

Mr. Bishop: Mr. Oppegard is trying to explain something to me that I just don't get.

I may want to ask Mr. Anderson another question
135 or two after lunch.

I have another witness. Do you want to take him now, your Honor?

The Court: We will take him for fifteen minutes.

Mr. Bishop: All right.

(Witness withdrawn.)

HARRY R. McHENRY, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bishop.

Q. Will you state your name, please?

A. Harry R. McHenry.

Q. Where do you live, sir?

A. I live in Newark, Delaware.

Q. And by whom are you employed?

A. By the Federal Deposit Insurance Corporation.

Q. For how long a time?

A. Since May, 1936.

Q. In what division or branch?

A. In the audit division.

Q. What has been your experience in the auditing
136 field prior to the time you were employed by the Federal Deposit Insurance Corporation?

A. I was fifteen years in public accounting, thirteen of those with Ernst & Ernst, for which I was their assistant manager of their Pittsburgh office.

Q. And since you went with F.D.I.C. what in general have your duties been?

A. Well, accounting, auditing, appraising, and so forth.

Q. Have you made an examination of the books of the Continental Bank recently with reference to the reciprocal bank balances?

A. I did.

Q. When did that examination take place?

A. I think on the 9th and 10th of this month.

Q. Do you recall, Mr. McHenry, how many different accounts you examined?

A. Well, in this order: We called on Mr. Cordes, and he turned us over to Mr. Ernest, and we saw their general ledger with respect to the bank's deposit accounts, and he submitted a statement of their reciprocal balances as of June 30, 1950, which showed the individual balances with whom the Continental had deposits, the amount
137 of those deposits, and against that as reciprocals the amount of deposits by those same banks with the Continental.

We next—

Q. You say you examined the general ledger?

A. That is right, the general ledger.

Q. What other particular records?

A. Well, then we went to the individual accounts.

Q. By individual accounts what do you mean?

A. Well, the record of the Continental's deposits with other banks. We checked those all through to their list which they had furnished.

Q. Do you mean the Continental deposited with other banks or the other banks deposited in Continental?

A. The Continental's deposits with other banks. And then to the accounts showing the other banks' deposits with Continental.

One is an asset account and one is a liability account.

Q. Where are the records maintained by Continental that show the deposit balances of other banks with the Continental?

A. It shows in their—they have individual ledgers 138 for each account. It may be classified in a number of different ways, but they are usually what they call their due-to-banks.

Q. And were those ledgers kept with the other ledgers of the bank where accounts of other depositors were kept?

A. Well, do you mean those showing reciprocals?

Q. Yes.

A. Oh, yes, they were intermingled with the other bank deposit accounts.

Q. Did you also examine the accounts of a Pittsburgh bank and of a New York bank?

A. Yes.

Mr. Mayer: I object to this. He is going into outside banks and that would have no materiality or relevancy to this suit.

The Court: Were these reciprocal banks?

Mr. Bishop: Yes, these were reciprocal banks.

Mr. Mayer: But we have stipulated as to the amounts. Your Honor, I do not see the purpose of this at all.

139 The Court: What is the use of putting it in the record if there is a stipulation with respect to the amounts?

Mr. Bishop: This is to show, your Honor, that there was no netting of the balances by either bank.

The Court: Well, hasn't he stipulated to that also?

Mr. Mayer: There was a netting of the balances.

Mr. Bishop: No, there was not.

Mr. Mayer: Well, there was on the records.

Mr. Bishop: Not on the individual accounts.

Mr. Mayer: Maybe not on the individual accounts, but—

The Court: Then, if there is a controversy over what the facts were, we may go into it. Objection overruled.

By Mr. Bishop:

Q. Do you have the question?

A. Yes, I did visit the New York bank and the Pittsburgh bank.

140 The Court: Suppose we take a recess at this time.

(Thereupon the trial of the above enttiled case was recessed until two o'clock p.m. of the same day, November 21, 1955.)

141

* * (Caption No. 54 C 1667) * *

Before Judge Perry
November 21, 1955,
2:00 o'clock p.m.

Trial resumed pursuant to recess.

Present:

Same as before.

HARRY R. McHENRY, resumed the stand and testified further as follows:

Direct Examination by Mr. Bishop. (Cont.)

Q. Mr. McHenry, when we adjourned before lunch you were telling us about the examination you had made of certain records of the Continental Bank and the records of a Pittsburgh bank and a New York bank with reference to deposit balances of each bank in the other.
142 Do you recall that?

A. Yes, that is right.

Q. Would you tell the court what examination you made first at the Continental Bank, what records you examined?

A. At the Continental Bank the first record I examined was their general ledger.

Q. And then what?

A. And then their statement of their reciprocals. And then I saw the individual ledger accounts of the deposits by them, that is, by Continental, with other banks.

Q. Did you pick one particular date to examine the individual ledgers of each bank with which Continental maintained reciprocal relationships?

A. Yes, I did.

Q. What date was that?

A. July 30, 1950. Or June 30, 1950. My error.

Q. Did you examine the same date in the Pittsburgh bank and the New York bank?

A. I did.

Q. From that examination are you able to tell whether the balances, the deposit balances, were carried on a
143 gross basis or whether they were netted in those individual accounts?

A. They were on a gross basis.

The Court: You were able to tell and found that it was on a gross basis?

The Witness: On a gross basis in each instance.

By Mr. Bishop:

Q. Was there a number of items in each of the different accounts that you examined?

A. There were many items.

Q. And what was the nature of those items?

A. Well, deposits—

Q. I mean the entries on the accounts.

A. Well, they were debits and credits representing deposits and withdrawals mainly. Transfers.

Q. Would the same be true as to the records of the New York bank and the Pittsburgh bank?

Mr. Mayer: I object to that as immaterial.

The Court: Objection overruled. It may be answered.

The Witness: It would be the same.

Mr. Bishop: I will ask the reporter to mark as 144 Plaintiff's Exhibit 7 for identification that which purports to be a statement of an account of the New York bank with the Continental Bank; and as Plaintiff's Exhibit 8 for identification that which purports to be a statement of the New York bank with the Continental.

(Said documents were respectively marked Plaintiff's Exhibits 7 and 8 for identification.)

By Mr. Bishop:

Q. Will you refer to what has been marked for identication as Plaintiff's Exhibit 8 and tell the court whether you examined the original record from which that was taken?

A. I did.

Q. And where did you make that examination?

A. The office of the New York bank.

Q. At about what date?

A. November 1 or 2, I don't know which one of those two days, this year.

Q. After you made the examination of the original record was this photostatic copy handed to you by the bank?

A. It was.

145 Q. And subsequent to receiving it did you check the items on the photostats with the original?

A. I did, after I received it, when they were both in my possession.

Q. Does that exhibit reflect the entries that you examined with reference to that account?

A. This is a statement submitted by the Continental showing the entries on their books—

Q. That is right.

A. —of the New York bank.

Q. What I am asking you is whether or not the photostat is a true and correct reproduction of the original record which you examined.

A. That is right.

Q. Referring to Plaintiff's Exhibit 8 for identification, without going through all the questions and answers, would the same be true of that one?

A. That would be practically the same thing. That was a statement from the New York bank showing the Continental account.

Q. By reference to those two statements are you able to tell the court whether the deposit balance in the

146 Continental Bank and the deposit balance in the New York bank were netted or—

A. They were not.

Q. —or were the gross amounts shown?

A. They were not netted.

Mr. Bishop: I offer those in evidence.

Mr. Mayer: They are objected to as being immaterial.

The Court: Overruled, admitted.

(Said exhibits, so offered and received in evidence, were respectively marked Plaintiff's Exhibits 7 and 8.)

Mr. Bishop: I will ask the reporter to mark these Plaintiff's Exhibits 9, 10 and 11 for identification.

(Said documents were respectively marked Plaintiff's Exhibits 9, 10 and 11 for identification.)

By Mr. Bishop:

Q. I show you what have been marked Plaintiff's Exhibits 9, 10 and 11 for identification, and I ask you whether Plaintiff's Exhibits 9 and 10 were obtained by you in the same way that you have described 147 with reference to Plaintiff's Exhibits 7 and 8.

A. That is true.

Q. And there again you made the examination of the original records and checked the photostats with the original?

A. That is correct.

Q. Those exhibits refer to deposit balances of the Continental in—

A. Pittsburgh.

Q. —the Pittsburgh bank, and the deposit balances of the Pittsburgh bank in the Continental?

A. In the Continental, that is right.

Q. And that covers the date June 30, 1952?

A. No. No. That covers September 30, 1952, because that was on account of the disposal plan of the Pittsburgh bank, they did not have any prior to that date.

Q. And Plaintiff's Exhibit 11 for identification, however, does cover the June 30 date, does it not?

A. That is true.

Q. Would the same answer apply with reference to these exhibits that you gave with reference to Plaintiff's

Exhibits 7 and 8, that is, that the deposit balances
148 were shown gross?

A. Shown gross.

Mr. Bishop: I offer these in evidence.

Mr. Mayer: They are objected to as being immaterial.

The Court: Objection overruled. Admitted.

(Said exhibits, so offered and received in evidence, were respectively marked Plaintiff's Exhibits 9, 10 and 11.)

Mr. Bishop: You may cross examine.

Cross Examination by Mr. Mayer.

Q. Mr. McHenry, in the course of your examination of the records of the Continental Bank did you also have occasion to look at its records whereby they netted these reciprocal balances?

A. On their general ledger, yes.

Q. You did see that under the general ledger?

A. On the general ledger, that is right.

Q. And do you know how often that ledger was kept?

A. Every day.

The Court: What you mean to say is that they
149 kept both general and—

Mr. Mayer: That is why I don't know what this is all about.

The Court: They kept it on two bases, one gross and one net, so that you could find either the gross figure or the net figure each day?

The Witness: One was a controlling account of all the balances. That would be the general ledger.

By Mr. Mayer:

Q. But it showed each individual bank, it showed—

A. Oh, no, not the general ledger didn't, the general ledger controlling account.

Q. The general ledger showed the name of this same Pittsburgh bank?

A. I am afraid not.

Q. It showed the name of the New York bank?

A. It showed due-from-banks and due-to-banks.

The Court: If I understand your testimony then in the general ledger or the controlling ledger, that was kept solely on the gross basis, but the account of each individual bank was kept on a net basis?

150 The Witness: No, the reverse.

Mr. Bishop: Exactly the opposite.

The Court: Just the reverse?

Mr. Bishop: Yes.

The Witness: Yes.

The Court: Then the controlling ledger was kept on a net basis?

The Witness: That is it.

The Court: And the gross account in each individual bank's account was kept on the gross basis?

Mr. Bishop: That is right.

The Court: I want to get it straight.

Mr. Mayer: That is right.

Mr. Bishop: Let me ask him a few questions to clarify it.

Redirect Examination by Mr. Bishop.

Q. You have described the method that the individual accounts were kept by. There were 26 of these banks, were there not?

A. I think approximately that. I wouldn't want to swear to that figure.

Q. And each had its own separate ledger account?

151 A. That is right.

Q. Then the entries from those separate ledger accounts were transposed onto what you call a control account?

A. Well, the daily items were in there and the controls were kept in ordinary manner.

Q. And that is the point at which the netting was done?

A. That is right, on the general ledger.

Q. They took all 26 together and netted them at that point, is that correct?

A. Yes. They took the banks on which they had deposits and offset the balances of the banks that had balances with them, deposits with them, each day.

Q. And that was the figure that was carried into the general ledger?

A. That figure was carried into the general ledger accounts.

Recross Examination by Mr. Mayer.

Q. Didn't you also have occasion, though, to see this daily record that was kept which netted—

A. That is right.

152 Q. —each bank?

A. Yes.

Mr. Mayer: That is all.

Redirect Examination by Mr. Bishop.

Q. The daily record, though, was kept that netted each bank?

A. No. It did not net each bank.

Q. No?

A. It did not net any bank. It just showed the reciprocal amounts.

Mr. Mayer: We will show you are mistaken.

The Witness: No, I am not. It showed the reciprocal amount, but not the net.

Mr. Mayer: All right.

The Court: Well, what is the difference between the reciprocal amount and the net?

The Witness: It is the lower of the two balances.

The Court: What is that?

The Witness: It is the lower of the two balances, made the offset.

Mr. Mayer: That is right.

The Witness: I am right?

153 Mr. Mayer: That is right, but it shows the reciprocal amounts as to each bank each day.

The Witness: That is right. It shows the reciprocal amount, but not the net balance.

Mr. Mayer: But by a little simple arithmetic you can compute the net balance?

The Witness: That is very true, but it does not show it.

Mr. Mayer: All right. That is all.

Mr. Bishop: That is all.

The Court: It is on the records but it is not computed?

The Witness: You might say that.

The Court: It is not added up.

The Witness: There are a lot of things on the records that are not computed.

Mr. Mayer: That is all.

(Witness excused.)

Mr. Bishop: If your Honor please, I would like to recall Mr. Anderson.

The Court: All right.

Mr. Bishop: There was a question asked which I 154 did not hear.

The Court: You may recall him.

A. E. ANDERSON, recalled as a witness herein on behalf of plaintiff, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination by Mr. Bishop.

Q. Mr. Anderson, at the conclusion of your testimony a question was asked you regarding whether or not an auditor could tell from certified statements filed whether reciprocal balances were deducted or excluded from deposits and your answer to that was what?

A. It was "Yes."

Q. Do you want to amplify that answer?

A. Yes, I want to make it clear that an auditor going into the bank can tell. But receiving the certified statement in our office in Washington and making an office review of it, it is impossible to tell from that if they have excluded it from the reported deposits. You can tell if they deducted it of course because it is written out on the statement, but you cannot tell if they leave it out of deposits in the reported deposits, and that is particu-
155 larly true under the old law when they tabulated deposits for every day of the year, there is no way of telling in that gross figure in a big bank whether or not they have left out those reciprocal balances.

Mr. Bishop: That is all.

Recross Examination by Mr. Mayer.

Q. Mr. Anderson, I want to show you the original of the copy of which was introduced as Plaintiff's Exhibit 4, and ask you to examine that.

A. Yes, sir.

Q. I think the next one, the original, the reply from Continental, dated September 9, 1937, I believe is in as Plaintiff's Exhibit 5. That is right, isn't it?

Mr. Bishop: That is right.

By Mr. Mayer:

Q. From an examination of those two documents and particularly from the statement at the end of the letter of September 9 from the Continental to the Federal Deposit Insurance Corporation, in which they stated that they were enclosing a check for $639.35, it was perfectly clear from that and from the figures showing the 156 reciprocal amounts that we were not complying with the request of the corporation not to deduct or to exclude reciprocals, is that correct?

A. Yes, in the filing of these amendments it would be possible to tell from the difference between the original figures and the amended figures that all of that reciprocal had not been—

Q. Well, even without the statement—

Mr. Bishop: Let him finish.

Mr. Mayer: He had answered the question by, "Yes," but if he wants to elaborate I will let him.

The Witness: Yes. If a comparison had been made of the two statements it would have been seen that on the amended statement the Continental reduced their reported deposits by the amount that they had claimed for reciprocal balance on their original statement, less the amount on which they paid the assessment.

Q. So that it must have been clear that we were excluding rather than deducting, is that right?

A. It will have to be a conclusion here if you let me answer this.

157 Q. No, I will change the question if you don't want to answer that question. I will try to give you a question which you will be willing to answer.

You see the figures here—they are so large I can hardly read them—

A. Yes.

Q. And, taking those figures and then computing the

additional assessment that would be based upon adding those figures into our deposits, it is a simple matter of arithmetic, isn't it, to make the computation? Mr. Curtis made it for me before and it shows approximately $13,000 would have been added to our assessment. Is that correct, or do you want time to figure it out?

A. No, that is very clear to me—

Q. All right.

A. —and when I read those letters I could see it. I can only say when those are received—the bank had been asked to include reciprocal balances in their base. They were told they were not eligible for deduction, and apparently it had not occurred to the F.D.I.C. that they simply did not claim any deduction—

158 Mr. Mayer: I move to strike that out. You are not answering any question now. You are just making a statement.

The Court: It may be stricken.

By Mr. Mayer:

Q. The question which I have put to you is that from these figures and from the additional assessment which would arise from including these reciprocal amounts which we deducted or excluded, it was perfectly clear that we were not complying with the request of the corporation not to deduct reciprocal balances, is that correct?

A. It would be clear to anyone with a mathematical mind and who knew about assessments—

Q. Well, you, as an auditor, I think have a pretty good mathematical mind, so that when you reviewed these papers in your position in 1938, or whatever the date was, it was clear to you that the Continental Bank had continued its prior position with respect to reciprocal balances, is that correct?

A. Yes. I went in in 1946 but I did not see these until then.

Mr. Mayer: That is all.

The Witness: But it is obvious to me now that
159 they were omitted.

Mr. Mayer: That is all.

The Court: Anything further from this witness?

Redirect Examination by Mr. Bishop.

Q. How many banks in your experience are there where these reciprocal bank relationships are maintained with each other?

A. I would say that out of the 13,600 bank that there are probably not more than 300 or 400 bank that have reciprocal balances, and they are almost entirely in the larger banks.

Mr. Bishop: That is all.

The Court: Witness excused.

(Witness excused.)

Mr. Bishop: I would like to ask Mr. Curtis one question if I may.

Mr. Mayer: We are going to put him on the stand anyway and you can cross examine him. If it is not proper cross examination you then can make him your witness.

Mr. Bishop: That concludes our case, your Honor.

Mr. Mayer: Would you like to put him on now?

160 The Court: Plaintiff rests.

Mr. Bishop: I just want to ask him one question.

Mr. Mayer: Go ahead.

Mr. Bishop: And that is that the method Mr. McHenry described with respect to reciprocal accounts in which he made his examination as of June 30, 1952, that same method was followed as to all of the reciprocal accounts, was it not?

Mr. Curtis: That is correct.

Mr. Bishop: That is all I want to ask him.

Mr. Mayer: He has not been sworn yet.

The Court: He has not been sworn.

Mr. Bishop: You don't have to swear him, as far as I am concerned.

Mr. Mayer: If you are willing we will treat it as though he were sworn.

The Court: That is all right.

Mr. Bishop: I said 1952. I should have said 1950.

Mr. Curtis: The same method was used throughout the period we are talking about.

The Court: So the record may be clear we should have the exact name of the gentleman, whether it is Curtis or Cordes.

Mr. Mayer: This is Mr. Curtis.

The Court: And his first name?

161 Mr. Curtis: Frederick A. Curtis.

The Court: Are you going to take the witness stand?

Mr. Curtis: In a moment, yes.

Mr. Mayer: I have another witness to call first, your Honor, and as far as Mr. Curtis is concerned his oath may be retroactive.

(Witnesses Frederick A. Curtis and Fred Remmert were duly sworn to testify.)

The Court: Mr. Curtis, you have now been sworn to testify. Would your answer to that question be the same?

Mr. Curtis: Yes.

FRED REMMERT, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mayer.

Q. What is your name, please?

A. Fred Remmert.

Q. What is your address?

A. 627 East 101st Street, Chicago.

162 Q. And you are with the Continental Illinois National Bank and Trust Company of Chicago, the defendant in this suit?

A. Yes, I am.

Q. What is your position?

A. I am a second vice-president, in charge of the central proof department.

Q. How long have you been with the bank?

A. Twenty-eight years.

Q. Mr. Remmert, you have examined the records of the bank and you have made some computations with respect to the volume of cash items handled in the bank?

A. Yes, I have.

Q. And those computations were made with respect to what year?

A. I took 1952 as a base year.

Q. And that is a fairly typical year?

A. Yes, it is.

Q. With some variations?

A. That is right.

Q. I think your computations related to some Mondays, is that correct?

A. Yes. I particularly referred to Saturdays and 163 Mondays, weekends.

Q. During that year what was the minimum num-

ber of items handled on a Monday, say?

A. Well, the minimum number of items handled on any particular Monday during that year was 506,924 items.

Q. And by items you mean checks and similar instruments for payment of money, is that right?

A. Yes, these so-called cash items that come into the bank.

Q. What was the maximum number handled on Mondays?

A. Maximum number handled during that year was 771,564 items.

Q. And did you compute an average?

A. Yes, I did.

Q. What is the average?

A. The average number of items for a Monday is 632,274 items.

Q. And did you make similar computations with respect to Saturdays?

A. Yes.

Q. What was the minimum?

A. The minimum on a Saturday was 273,308 items.

Q. And the maximum?

164 A. The high was 486,524 items. The average was 366,500.

Mr. Mayer: That is all. Is there any cross examination?

Mr. Bishop: No cross examination.

The Court: Witness excused.

(Witness excused.)

Mr. Mayer: Mr. Curtis.

FREDERICK A. CURTIS, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mayer.

Q. Will you give us your name and your address, please?

A. Frederick A. Curtis; Barrington Township, Barrington, Illinois.

Q. And you are auditor of Continental Illinois National Bank and Trust Company of Chicago?

A. No, sir. I am the comptroller of Continental Illinois National Bank and Trust Company.

Q. I beg your pardon. You have held that position how long?

165 A. Approximately three years.

Q. Before that you were—

A. Assistant comptroller.

Q. And you have been with the bank how long?

A. About thirty-two years.

Q. With respect to the reciprocal bank accounts, those account are handled in the manner as I understand as described by Mr. McHenry, that is, they are gross amounts but they are also netted each day, is that right?

A. That is correct.

Q. Did you send for one of those records?

A. I sent for one of those records, and let me say that what Mr. McHenry said about a figure that isn't carried across is not extended or deducted, is true. In other words, we have both the gross and the reciprocal portion of it on the records.

Mr. Mayer: I will ask the reporter to mark this Defendant's Exhibit 1 for identification, and this as Defendant's Exhibit 2 for identification.

(Said documents were respectively marked Defendant's Exhibits 1 and 2 for identification.)

166 By Mr. Mayer:

Q. Mr. Curtis, I show you a document which has been marked Defendant's Exhibit 1 for identification, and it is headed "Treasury Department, Office of the Comptroller of the Currency, June 1942."

Was that received on or about the date it bears from the Comptroller of the Currency by your bank?

A. It was.

Q. And as far as you know that has been in force and effect ever since?

A. That has.

Q. I show you a document marked Defendant's Exhibit 2 for identification. Was that received from the Federal Reserve Bank of Chicago on or about the date it bears, July 1, 1942?

A. It was.

Q. And that has been in force since?

A. It has.

Mr. Mayer: I will offer these in evidence as Defendant's Exhibits 1 and 2.

Mr. Bishop: I want to object to both of them. They show on their face that they are communications re-

167 ceived from the Office of the Comptroller of the Currency and from the Federal Reserve Bank, neither of which is related or in any way affiliated with the Federal Deposit Insurance Corporation.

Mr. Kohn: It is the same government, though, isn't it?

Mr. Bishop: What the bank may be required to do under the Federal Deposit Insurance Act is in no way related to what the bank may be required to do under the Federal Reserve Act or under the regulations of the Comptroller of the Currency.

Mr. Mayer: If your Honor please, I am offering them as showing banking practice and we are ordered to do with respect to the showing of our reciprocal accounts, that the Comptroller of the Currency directs us to net, and that the Federal Reserve Board also directs us.

The one is with respect to statements as to our condition, showing the amount of our deposits; the other is with respect to setting up reserves. They are all part
168 of the banking system and part of good banking practice.

I think it is very relevant and pertinent to the issues here.

The Court: What would happen if you did not carry out these instructions?

Mr. Mayer: The Comptroller would probably take our charter away.

The Court: They may be admitted.

(Said exhibits, so offered and received in evidence, were respectively marked Defendant's Exhibits 1 and 2.)

Mr. Mayer: I would like to read one sentence out of Regulation D, promulgated by the Board of Governors of the Federal Reserve System, which—

Mr. Bishop: Same objection to that.

Mr. Mayer: I am assuming you are not objecting as to authenticity.

Mr. Bishop: No, not as to authenticity.

The Court: He is protecting his record as to materiality.

Mr. Mayer: Yes.

169 Mr. Bishop: That is right.

The Court: Objection overruled. You may read it.

Mr. Mayer: It says:

"In determining the reserve balances required under the terms of this regulation member banks may de-

duct from the amount of their gross demand deposits the amount of balances subject to immediate withdrawal due from other banks and cash items in process of collection, as defined in subsection (g) of Section 1 of this regulation."

Q. Mr. Curtis, with respect to the reserve accounts, you are familiar with the —

May I have a copy of the stipulation?

Mr. Korn: Here is a copy.

By Mr. Mayer:

Q. You are familiar with the bank's records and with the transactions in question as to the purchase of these accounts, these contracts. Will you tell how this contract was actually handled by the bank?

Mr. Bishop: If your Honor please, I want to object to any testimony that is going to vary the terms
170 of the contract. I do not think the bank or the customer either has a right to bind us by some sort of bookkeeping entry that may be at variance with what the contract itself provides.

Mr. Mayer: If the court please, that might be a good objection if this were a suit on the contract. This is a suit to show what we actually did, and all I am asking is as to what we actually did. I don't know whether this is at variance with the contract or whether it is an interpretation of the contract, but we are showing what the practice was, how it was handled, how it was treated.

The court at the inception indicated it wanted to know how it was handled. That is all I am trying to do.

The Court: What do you say about that?

Mr. Bishop: I still say the same thing —

The Court: Do you still say it is a suit under the contract?

Mr. Bishop: No, no, but I say the contract governs as

to whether or not the ten percent contract reserve
171 held by the bank is a deposit or not a deposit, and that the way the bank kept its books cannot change that contract, no matter how they kept it on their books.

If what he argues were correct, your Honor, the banks could by any method they chose in keeping their records, take something in or out of deposit liability at will. As far as we are concerned it is the contract which governs, and not the way the bank kept its books.

The Court: Objection sustained, but he may place it in under Rule 43. Answer the question.

Mr. Bishop: May the objection go then to the whole, so I won't have to interrupt him right along?

The Court: To the whole line of questioning on this point?

Mr. Bishop: Yes, your Honor.

The Court: All right. So long as he stays on this point it will not be necessary to renew the objection. He is
172 offering it under Rule 43, so it will be in the record.

By Mr. Mayer:

Q. Will you answer the question, how was this reserve account handled?

A. When installment paper was offered to us by our customer we debited loans and discounts with one hundred percent of the amount of that paper, and we set up a contract reserve equal to ten percent of that paper.

Q. Was that ten percent included in the deposits you reported to the Comptroller or to the Federal Reserve Board?

A. They were not. They were reported on Other Liabilities.

Q. And they were treated generally as Other Liabilities?

A. That is right.

Mr. Mayer: There is nothing in this that varies the

terms of the contract. As I see it, it is purely an interpretation of the contract.

The Court: We will have it in the record.

Mr. Mayer: Yes.

The Court: You may refer to it as having been
173 offered, tendered, in your arguments and briefs.

By Mr. Mayer:

Q. Have checks ever been drawn against that account?

A. None have.

Q. Have checks ever been issued?

A. None have.

The Court: Could checks be issued?

By Mr. Mayer:

Q. Could checks be issued?

A. They could not. Perhaps I should change that and say they could be issued but we would not pay them because they are our security.

Q. Well, there have never even been checks printed to be drawn against that account?

A. None printed, no.

Mr. Mayer: I think that is all.

The Court: You may cross examine.

Mr. Mayer: I would just like to renew my offer and urge your Honor to reconsider your ruling in sustaining the objection, because nothing has been stated here that
in any way varies the contract. This is merely evi-
174 dence as to the workings and interpretation of the contract.

The Court: You can argue in the brief.

Mr. Bishop: I am sorry, I did not hear what Mr. Mayer said.

Mr. Bishop: I urged the court to reconsider his ruling on the evidence, on the ground that there is nothing that has been testified to that in any way varies the contract,

that it is merely a matter of interpreting the contract and to show how it has been carried out.

The Court: You may argue it in the brief, and I can always change my ruling at the time of argument if I deem it proper.

Mr. Mayer: That is all. Is there any cross examination?

Cross Examination by Mr. Bishop.

Q. Mr. Curtis, the so-called contract reserve account with this customer was kept with the individual deposit ledgers or in the individual deposit ledgers of the bank, was it not?

A. That is correct.

175 Q. Under the name of the customer?

A. Under the name of the Continental Illinois Bank, then the customer's name, and then "Contract Reserve". In other words, that was a compound name, having two names and then the words "Contract Reserve".

Q. Those are the same ledgers where you keep deposit accounts of other customers?

A. That is correct.

The Court: I suppose you tender that as cross examination under Rule 43 and not to be a part of the record—

Mr. Bishop: No, I—

The Court: —unless I should at a later time—

Mr. Bishop: No, I do not tender that under Rule 43 at all, your Honor.

The Court: All right. It may stand in the record then.

Mr. Bishop: This question, if your Honor please, I would like to ask under Rule 43.

The Court: All right. If you wish to tender the next question under Rule 43 the court will accept it under

176 Rule 43 with the understanding that if I should see fit after briefs and arguments to change my ruling

then the same ruling would apply to counsel's direct and to the cross examination.

By Mr. Bishop:

Q. You stated that checks could not be drawn and would not be drawn against the contract reserve account. Is that correct?

A. I think I changed that just a little bit to say they could be drawn but we would not pay them.

Mr. Mayer: May I interrupt, Mr. Bishop?

Do you mean physically drawn?

The Witness: I say they could be physically drawn, yes.

By Mr. Bishop:

Q. Under the terms of the contract there was a minimum amount required to be kept in that contract reserve, is that correct?

A. That is correct.

Q. Assume that the relationship between the bank and the customer terminated as of December 1 of this year; would not the balance in that contract reserve account be paid by the bank to the customer?

177 A. No, it would not. That would be in effect —

Q. It is not the bank's funds, is it?

A. There are no funds there.

Q. Mr. Curtis, where there is a deposit account in the bank the bank does not segregate the actual dollars that are evidenced by that deposit, does it?

A. That is true.

Q. So that every deposit is in reality a bookkeeping entry, is it not?

A. The liability, yes.

Q. And this so-called contract reserve account was a bookkeeping in which the bank indicated on its books that it owed a certain customer a certain amount of money, is that correct?

A. That is correct.

Q. I ask you again, if that relationship terminated would not that fund after charging off all of the defaulted contracts that may exist be paid by the bank to the customer?

A. No, it would not.

Q. What would be done with it?

A. In effect the customer would be repurchasing paper on the same basis that it was bought from him originally, namely, 90 cents on the dollar.

178 Q. Is there anything in the contract that provides for such a repurchase?

A. Yes, I believe there is.

Q. I hand you the contract. Will you show me where that is?

A. I will try to.

No, there is no repurchase agreement.

Mr. Mayer: Will you look at paragraph 11?

In fairness to the witness, I think that is what he had in mind.

The Witness: Would you restate your question, please?

Mr. Bishop: Will you read the question to him, please?

(The last portion of the record was read by the reporter.)

By Mr. Bishop:

Q. Are you referring to paragraph 11?

A. Paragraph 11, yes.

Q. That paragraph refers to the situation where the amount is reduced to an amount below the credit in the contract reserve account.

A. Equal to or below, yes.

Q. Yes.

179 Mr. Mayer: He assumes, I suppose, that that is when it would be terminated. You asked him about termination.

By Mr. Bishop:

Q. Mr. Curtis, if the amount in the contract reserve account was less than the minimum balance, was not the customer required to bring it up to that minimum balance?

A. The contract so provides.

Q. How would they do that, by transferring funds?

A. No. There is an accounting made at the end of their fiscal monthly periods, and at that time the amounts owing them for any contracts purchased during the period would be offset; in other words, it is a net settlement at the end of that period, taking into consideration all of the debits and the credits.

Q. So that in that way, by taking into consideration debits and credits, if the minimum amount was below the contract requirement it would be brought up to contract requirement in that way?

A. That is correct.

Q. If it was over that the customer would take it down; if it was over the minimum requirements the 180 customer would take it down?

A. He would retain from his collections his ten percent.

Q. Well, if you would rather put it that way.

A. Yes.

Q. Where the bank held funds such as we have described here you treated those as funds held for security, did you not?

A. That is correct.

Q. And your records so showed?

A. The records so showed.

Mr. Bishop: If the court please, I want to ask him some questions about reciprocals, which has nothing to do with Rule 43.

The Court: All right. We will go out from under Rule 43 now.

This is on the record.

By Mr. Bishop:

Q. Mr. Curtis, I want to get straight in the record the method of accounting relating to reciprocal bank accounts. If I understand it correctly, a reciprocal bank account, we will say with the New York bank, is carried in an individual ledger account just the same as the account of any other depositor, is that correct?

181 A. That is correct.

Q. And that account shows the deposit balance at the end of any particular day or particular period, does it not?

A. It does.

Q. The same as my account or your account?

A. That is correct.

Q. That account also shows deposits to the account and withdrawals from the account?

A. That is right.

Q. And the bank periodically would send to the New York bank a statement showing the position of that account?

A. That is right.

Q. The statements which the Continental would receive from the New York bank would be kept in the same way, is that not correct?

A. That is correct.

Q. Daily you would show on a sheet or an account which you keep there all of the reciprocal accounts and you would show both the due-to and due-from amounts, is that correct?

A. That is correct.

182 Q. And then from that record you would draw the net amount of the reciprocal balances which was carried into the general ledger, is that correct?

A. That is correct.

Q. And that is the first time there was any netting of the reciprocal amounts?

A. That is correct.

Mr. Bishop: That is all.

The Court: Is there any redirect examination?

Mr. Bishop: I have one or two further questions, your Honor. I am sorry.

By Mr. Bishop:

Q. The netting was not as to the individual accounts; the netting was as to all reciprocal accounts?

A. The netting had to be as to individual accounts. We would have no way to determine if you took two bulk things—

Q. But you did not net each individual account?

A. A record is kept daily, so—

Q. No. Mr. Curtis, my question is clear. You did not net each individual account, did you, daily?

A. No, we did not.

183 Q. But you did net all the reciprocal accounts?

A. Correct.

Q. And that netting of all the accounts is the one that went into the general ledger?

A. Right.

Mr. Bishop: That is all.

Mr. Mayer: That is all.

(Witness excused.

Mr. Mayer: The defendant rests.

The Court: Is there any rebuttal?

Mr. Bishop: We rest also, your Honor.

(Here followed discussion off the record.)

The Court: Taken on briefs, thirty days, thirty days and twenty days, and oral argument shortly thereafter on motion.

(Here followed further discussion off the record.)

Mr. Bishop: Judge, I think I will only take twenty days for our original brief.

The Court: All right. Twenty, thirty and twenty.

I will set Friday, February 17, at two o'clock, for argument.

184 This case probably ought to be argued in an hour, don't you think, after I have studied the briefs?

Mr. Bishop: I believe it will be more or less an informal discussion of the things we have not made entirely clear to your Honor.

Mr. Mayer: It should not be protracted.

185

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 54 C 1667) • •

I, Edward Newlander, do hereby certify that I reported the proceedings had in the trial of the above entitled case before Honorable J. Sam Perry, one of the judges of said court, on November 21, 1955; and that the foregoing is a full, true and accurate transcript of said proceedings.

Edward Newlander
Official Court Reporter
United States District Court
Northern District of Illinois

259

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 54 C 1667) • •

TRANSCRIPT OF PROCEEDINGS.

Before Hon. J. Sam Perry, Judge

March 9, 1956

261 The Court: You may proceed, gentlemen.

Mr. Mayer: In this case your Honor will remember we stipulated most of the facts and there was a hearing on a few additional facts.

I am asking to reopen the record for just one short fact, and that is this.

Mr. Anderson of the F. D. I. C. testified with respect to two matters: One, the reciprocal bank accounts; and two, cash items, that every other bank except, I think he said, two, and except our bank, had paid.

I stated at the time and I still say that that is an immaterial fact, but Mr. Anderson failed to tell your Honor at that time that a number of banks had paid under protest, and I think that the record should be completed. Mr. Bishop here has been kind enough to get the facts together and he has a statement as to that.

The Court: I think it would be well for the record to show that.

Mr. Mayer: The record should speak the whole truth and not half the truth.

Mr. Bishop: I do not agree that the whole truth was not spoken, but it is the construction —

The Court: We won't characterize it at this time.

262 Mr. Bishop: But it is the construction that it put on it, Judge.

Mr. Anderson, after Mr. Mayer's request, has made a review of the audit report records, and they show that forty banks deducted reciprocal bank balances in computing assessments under the 1935 statute. All of those banks paid their assessments, including two banks that paid under protest. Those two banks he does not care to have named. One of them is in Boston and the other is on the West Coast. Those are the two in addition to Continental. They paid, but they paid under protest.

With reference to cash items our investigation showed that there were ten banks who paid assessments under protest involving cash item deductions. There were only two banks who did not pay but who posted security pending

the outcome of this case. Of those two banks one is in Chicago and one is in New York. Those are in addition to Continental.

That is what the records of our agency show with reference to that.

263 The Court: And you are stipulating that those are the facts?

Mr. Bishop: Yes.

Mr. Mayer: Yes.

The Court: Has it been reduced to writing or shall we have it just stand in the record?

Mr. Bishop: I think the best way is to just let it stand the way I have stated it.

Mr. Mayer: I think so. It will save time that way.

Mr. Bishop: I, if your Honor please, would like to make a request of Mr. Mayer as long as he has requested reopening of the proof, and in view of the fact that his brief makes quite a point of the fact that the Continental did not get all the deductions it was entitled to under the statute, I am asking, if your Honor please, to offer in evidence the fact that under the 1935 statute the deductions which Continental took for uncollected cash items was 7.24 per cent of its deposits and that the deductions which it took under the 1950 statute were 12.43 per cent of its deposits, or an increase of 5.19 per cent in the deductions that they took after the new act became effective.

264 I am asking that that be—

Mr. Mayer: I am objecting to that on several grounds.

The Court: First, you do not object to the truth of it, but you are—

Mr. Mayer: Yes, I object—I don't know whether it is true or not. I have had no opportunity.

I want to call your Honor's attention to this, that while we were stipulating the facts Mr. Bishop offered that and

I refused to stipulate it and he withdrew it from the stipulation, and then at the other hearing he made no attempt to show it. So I have ignored it.

The Court: Let me ask you this. Are you able to establish that by proof?

Mr. Bishop: Yes.

The Court: Is that what you wish to do?

Mr. Bishop: I have a witness here—

Mr. Mayer: In order to save time I am willing to stipulate that if the witness were called to the stand he would testify to that, but I say it is utterly immaterial—

265 The Court: Suppose you state your objections and then—

Mr. Mayer: I say, first, that I don't know whether those facts are true. Secondly, these facts were known to the plaintiff at the time he stipulated and at the time of the hearing, and no attempt was made to introduce it in evidence after we had refused to stipulate to the facts. Thirdly, it is entirely immaterial, that this might be misleading, that in order to meet the implication from this I ought to be allowed to prove what our collections were, and whether this percentage means anything might depend upon whether our whole collections have not increased. He is saying that maybe the percentage of collections to the percentage of total deposits—they are all kinds of factors you might have to go into, in order to determine whether this means anything. To me it is utterly meaningless to show just this one percentage, and I think the most that it could be would be to be prejudicial.

The Court: The objections will be overruled and we will permit the taking of the testimony, and then if you feel that you need something further after today's
266 arguments I will reserve ruling on it and I will give you an opportunity, because this is the kind of a case that you gentlemen have stipulated most of the facts and

you have saved a great deal of time, and if either of you feels you want to offer more evidence you are going to have the opportunity. This is not something I expect to rule upon this afternoon anyway. I have given considerable study to it, but I will listen to your arguments and I will want to give some more study to it, and if you feel there is need for the taking of some additional testimony that will be a simple matter. I am sure there will not be much, and I will not rule on it until after that has come in.

Mr. Bishop: In order to save time will you agree that if Mr. Anderson were called that he would testify to those facts?

Mr. Mayer: Yes, I would agree to that, to save time.

The Court: Without waiving his objection.

Mr. Bishop: Without waiving anything.

Mr. Mayer: Yes.

The Court: All right, so stipulated.

376

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1667) * *

Transcript of proceedings had in the above-entitled case before Honorable J. Sam Perry, one of the judges of said court, in his court room in the United States Court House, Chicago, Illinois, on September 7, 1956.

Present:

Messrs. Bishop, Burdett, Falasz & Doherty,
By: Mr. John H. Bishop,
on behalf of the plaintiff;

Messrs. Mayer, Friedlich, Spiess,
Tierney, Brown & Platt,
By: Mr. Frank D. Mayer and
Mr. Louis A. Kohn,
on behalf of defendant.

377 By the Clerk: 54 C 1667. Federal Deposit Insurance Corporation v. Continental Illinois National Bank and Trust Company. Motion for entry of judgment.

Mr. Kohn: Your Honor handed down a memorandum on June 20th. We have submitted from time to time drafts.

The Court: Well, and they asked time.

Mr. Kohn: One of Mr. Bishop's objections we met voluntarily and it was stricken from the proposed findings. Here is the judgment order.

The Court: If it will not take long, we will hear it now. If it will take considerable time, I will pass it.

Mr. Mayer: We ask you to adopt the stipulation of facts with a few additional facts.

The Court: If there are any objections, let me hear them now.

Mr. Bishop: I prepared written objections and served them on the gentlemen. They have acceded to the first one and amended the findings accordingly. I would like to point out in all fairness to your Honor that the objection to their findings 7, 8 and 9 is that they purport to find that the reduction applies to any base day. Well, the stipulation applies only to Monday base days. I
378 think they have inadvertently made the findings broader than the stipulation of facts. If your Honor wants to find it that way, it is perfectly all right with us.

The Court: Let us pass this.

Mr. Mayer: Would you like to set it for tomorrow?

The Court: I will have time this morning. I have just one little case before yours, and I just want to dispose of motions of course. I will give you plenty of time. I think we can dispose of it today.

(Whereupon the Court gave attention to other matters on the call, after which the following:)

The Clerk: No. 54 C 1667. Federal Deposit Insurance Corporation v. Continental Illinois National Bank and Trust Company.

Mr. Kohn: Mr. Bishop and ourselves have discussed the matter. I think there is nothing further I want to say about it.

Mr. Bishop: I just want the Court to understand what our point is.

The Court: I want to be careful about it, too. I am just as careful, want to be just as careful, because I don't want to enter an order that may have some legal weak-
379 ness in it. I want to save as much work for the upper court as possible, but I am always happy to have them review me. As far as I am concerned, they are the guardians of my conscience. But you have made a point: If there is something in the stipulation of facts—

Mr. Bishop: The point is simply this: the stipulation provides with reference to the cash items that the deductions occurred only in connection with Monday base days.

The Court: That is right. I understand that.

Mr. Bishop: The conclusions of law which they have incorporated provide that it applies to "base days," without specifically defining it as "Monday base days." Now, Mr. Kohn points out that the only controversy in the lawsuit relates to Monday base days, so he says it is all right. I say it is not.

The Court: I remember it very distinctly. You are right on it. You are right; the stipulation covers Monday. That was the stipulation, as to Monday; but the pleadings also show that only Monday base days were involved.

Mr. Bishop: My only point is in fairness to your Honor I thought I must call it to your attention. If your Honor wants to enter it the way he has drawn it after my statement on it, that is entirely up to you.

Mr. Kohn: You ruled in our favor on the cash
380 items and we have entered conclusions of law that so hold. When this gets up to the upper court, we can make any argument in support of it. This is a conclusion of law, not a finding of fact. I would also like to point out that we have entered judgment in favor of plaintiff on items which together with interest total $3,455.90.

Mr. Bishop: I think the record should contain one statement here. They have added interest at two percent, which was pursuant to an agreement between FDIC and the bank, and that does not appear in the record anywhere. Somebody may be curious why it was two percent. No objection to two percent, but I just state that so it is in the record.

Mr. Kohn: That is the rate you charged in the New York bank case.

The Court: I recognize this is a matter of determination of policy of law; and I recognize that however it was decided, with the amount of money involved, there would be an appeal by one side or the other or both, as a matter of policy there; and I believe this is almost a distinction without a difference in result. I am going to approve the findings of fact as they are submitted.

Mr. Kohn: Thank you, sir.

381 Mr. Bishop: In view of the fact that I am representing a governmental agency here, and recognizing full well that under the rules I am not required to file specific objections, nor am I required to ask specific findings of fact and conclusions of law, nevertheless, I am asking leave to file, if your Honor please, the objections which I served on the other side.

The Court: All right.

Mr. Kohn: Do you want to amend on the face those objections by striking out paragraph 1? It is academic now.

Mr. Bishop: I would like to strike paragraph 1 because they have conceded that to be a good objection.

The Court: I will bodily strike it by drawing a line through it and it is in effect amended, because, otherwise, I would have to sustain that particular objection.

Mr. Kohn: That is right.

The Court: And it has been agreed upon.

Mr. Bishop: That will be deleted.

The Court: That will be deleted. Leave granted to file that.

Mr. Bishop: I have served these gentlemen proposed findings of fact and conclusions of law which are in all respects contrary to the ones your Honor has found 382 except in those two instances where you found favorably to us. I presume there that your Honor will mark those denied or give me leave to file them, whichever you care.

The Court: The objections as filed, as amended, No. 1 being stricken, are overruled. So the record is clear on that. Now you are given leave to file proposed findings of fact and conclusions of law supporting your theory of the case.

Mr. Bishop: Yes.

The Court: They are filed and they are overruled, except insofar as they are consistent with the findings of fact adopted by the court.

Mr. Bishop: That is fine. That makes our record very good.

The Court: And the decree is entered—or, is it an order.

Mr. Mayer: Judgment order.

The Court: The judgment order will be entered at this time.

Mr. Kohn: Without costs against either party.

The Court: That is right.

383

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1667) * *

I, Alfred H. Frederick, do hereby certify that I reported the proceedings had in the above-entitled case before Honorable J. Sam Perry, one of the judges of said court, on September 7, 1956, and that the foregoing is a full, true and accurate transcript of said proceedings.

/s/ Alfred H. Frederick
Alfred H. Frederick,
Official Court Reporter,
United States District Court,
Northern District of Illinois.

October 18, 1956.

186 PLAINTIFF'S EXHIBIT 1.

(Excerpts)

(Filed Dec 3, 1956)

GENERAL STATEMENT

For the past few years it has been urged by the banking fraternity that the annual assessment of one-twelfth of 1 percent on the total deposits of insured institutions be reduced, since it was believed that the reserve against possible losses were adequate. The chairman of your committee has for some time had the problem under careful study and consideration, and on January 10, after extensive discussions with the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Board of Directors of the Federal Deposit Insurance Corporation introduced the bill which your committee is reporting in essentially the same form.

The committee also had before it four oth[illegible] bills providing for reduction or suspension of assessments and for increasing the maximum amount of accounts eligible for

insurance. These were S. 80, introduced by Senator Langer; S. 2094, introduced by Senator Butler; S. 2300, introduced by Senator Bricker; and S. 2307, introduced by Senator Pepper.

The amount received by the Federal Deposit Insurance Corporation from assessments is used to pay insured depositors in closed banks, to cover expense of operation, and to set up reserves for possible insurance losses. The Corporation's total surplus or insurance fund on December 31, 1949, was $1,203,942,687.92. During the year its income from assessments, investments, and other
187 sources was $145,514,301.53. Insurance losses were $641,183.22 and operating expense was $6,781,331.46. This left $138,091,786.85 to be added to the insurance fund, bringing it to the total above shown. The Corporation in 1948 completed repayment to the Treasury of $289,000,000 originally advanced by the Treasury and the Federal Reserve banks to provide its original capital.

Your chairman, in discussing the proposed legislation with representatives of the Corporation, was informed that several relatively minor technical changes in the deposit insurance law have been found desirable as a result of its 16 years of operation. Most of these suggested changes were included in S. 2822. This is the chief practical difference between that bill and the other measures considered by your committee.

Increase in the maximum insurable deposit from $5,000 to $10,000 encountered practically no opposition from witnesses testifying at the hearings. It was shown that this change would increase insurance coverage from 96 percent to 98.4 percent of all accounts in insured banks, and from 44.8 percent to 52.4 percent of total deposits in insured banks. This change was approved by your committee, but it is recommended that no further increase in

the maximum insurable account be made in the future because it should never be the policy of the Congress to guarantee the safety of all deposits in all banks.

Your committee carefully considered three proposed methods of reducing the incidence of the assessment upon insured banks. One such method was the proposed reduction in the rate of assessment by one-half—from one-twelfth to one twenty-fourth of 1 percent. A second proposal was the suspension of assessments so long as the Corporation's insurance fund remains at or above $1,000,000,000, the assessment to be reimposed if and when the fund should be reduced below that figure, such reassessment to be at a rate sufficient only to restore the fund to that amount.

A third method, the one approved by your committee, would require the Corporation to credit pro rata to insured banks 60 percent of its "net assessment income" as defined in the bill, such credits to be applied to the bank's assessment for the semiannual assessment period beginning on the next ensuing July 1. This change would be effective with the calendar year ended December 31, 1949, and for each subsequent calendar year. "Net assessment income" is defined as "the total assessments which become due during the calendar year less (1) the operating costs and expenses of the Corporation for the calendar year; (2) additions to reserve to provide for insurance losses during the calendar year, except that any adjustments to reserve which result in a reduction of such reserve shall be added; and (3) the insurance losses sustained in said calendar year plus losses from any preceding years in excess of such reserves. If the above deductions exceed in amount the total assessments which become due during the calendar year, the amount of such excess shall be restored by deduction from total assessments becoming due in subsequent years."

It is estimated that this change will result in a reduction of approximately 55 percent in the amount insured banks will hereafter pay for insurance of deposits as compared with amounts heretofore paid.

S. 2822 provides for changes in the assessment base. It would permit (a) the deduction from the deposit balance due to an insured bank of the deposit balance due from such insured bank; (b) the inclusion in uncollected
188 items of checks cashed over the counter; (c) the exclusion of outstanding drafts drawn on insured banks; and (d) the exclusion of cash funds received and held exclusively as security for a liability to the bank. Provision is also made for a semiannual assessment base of the average of the deposits for two days in each semiannual period—March 31 and June 30, and September 30 and December 31—instead of the provision in the present law of the daily deposit liabilities for each semiannual assessment period. These changes will not materially affect the assessment income, and will save the banks considerable expense and annoyance in the keeping of records and the preparation of assessment reports.

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189-207 * * *

208 PLAINTIFF'S EXHIBIT 2.

(Excerpts)

(Filed Dec 3, 1956)

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210 GENERAL STATEMENT

The Federal Deposit Insurance Corporation was established under authority of section 8 of the Banking Act of 1933, and section 101 of the Banking Act of 1935 which became effective August 23, 1935 and provided the permanent plan of deposit insurance contained in existing

law. Insurance of bank deposits by the Corporation began on January 1, 1934. The results since that date bespeak the outstanding record the Corporation has achieved in bringing to depositors sound, effective, and uninterrupted operation of the banking system with resulting safety and liquidity of bank deposits. There has been no failure of an insured bank since 1944. From inception of the Corporation through December 31, 1949, there had only been 411 cases of receivership or merger of insured banks. Such a record is quite in contrast to that preceding the creation of the Corporation. Leaving out of consideration the period 1930 to 1933, inclusive, when there was an abnormally high number of bank suspensions (9,106) and taking the 16-year period 1914 to 1929, inclusive, the record shows that there were nevertheless 6,392 cases of bank suspensions.

At the present time there are more than 104,000,000 depositors in insured banks and it is estimated that 95.7 percent of the accounts are fully protected by deposit insurance.[1] Banks which are members of the Federal Reserve System must be insured and nonmember banks may be granted insurance upon approval of the Board of Directors of the Federal Deposit Insurance Corporation. On December 31, 1949, there were 14,687 operating commercial and mutual savings banks in the United States with deposits aggregating 164.5 billion dollars. On the same date there were 13,628 (including 7 in possessions of the United States) insured institutions with deposits aggregating 156.8 billion dollars.

211

The initial capital of the Federal Deposit Insurance Corporation was provided by funds subscribed by the

[1] Due to the $5,000 insured limit per account it is estimated however that only 48.8—of total deposits in insured banks are covered by insurance.

Federal Reserve banks in the amount of $139,299,556.99 and by the Treasury in the amount of $150,000,000. Under the 1935 act, insurance of bank deposits was established on a basis to be supported by the insured banks through payment of insurance premiums. The surplus thus built up throughout the years together with income and profits from investments had exceeded expenses and net losses of the Corporation to such an extent by 1947 that the Congress approved the recommendation of the Directors of the Federal Deposit Insurance Corporation that steps could safely be taken to retire the stock of the Corporation when the surplus of the Corporation exceeded $1,000,000,000. Accordingly, under Public Law 363, approved August 5, 1947, the Corporation was directed to retire its capital stock by paying to the Treasury the amount originally advanced in the form of capital subscriptions by the Federal Reserve banks and the Treasury. Pursuant to such direction, the retirement of the capital stock aggregating $289,299,556.99 was completed on August 30, 1948. After such retirement of stock, the insurance fund of the Corporation on December 31, 1948, amounted to $1,065,850,901 or 1.435 percent of estimated insured deposits (74.3 billion dollars). By December 31, 1949, the insurance fund of the Corporation had increased to $1,203,942,687, representing 1.595 percent of the estimated insured deposits on that date (75.5 billion dollars). The insurance fund is invested solely in United States Government obligations. On December 31, 1949, holdings of United States Government obligations by the Corporation at cost and accrued interest receivable amounted to $1,207,289,098. Net income of the Corporation on holdings of securities in the year ended December 31, 1949, amounted to $25,122,803.

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212 The principal changes in the existing law made by this bill are (a) the increase in the insurance coverage from $5,000 to $10,000; (b) the simplification in the computation of the assessment base; (c) the reduction, in years in which the Corporation does not encounter undue losses, in the cost of deposit insurance to the banks by making provision for a credit to them of a percentage of the net assessment paid each year; (d) the expansion of examination authority to enable the Corporation to examine any insured bank or any bank seeking insurance; and (e) the payment to the Treasury of interest at 2 percent on capital funds originally provided by the Treasury and the Federal Reserve banks. The bill also contains other amendments of lesser importance, some of which are technical, and it repeals certain obsolete provisions of existing law.

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FEDERAL DEPOSIT INSURANCE ACT

The changes made by section 2 of the bill, as amended, in the Federal Deposit Insurance Act are set forth in the following section-by-section statement:

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213 The term "insured deposit" is redefined to provide for two changes: (1) The insurance protection is increased from $5,000 to $10,000, and (2) the insurance coverage afforded to deposits of States and other public units is brought on a parity with deposits of the United States. Under existing law each officer, employee, or agent of the United States who deposits public funds in an insured bank is deemed, for the purpose of determining the insurance coverage, to be a depositor in such custodial capacity (12 U.S.C. 265). By this amendment like protection is extended to public funds deposited by officers, employees, and agents of any State, of the District of Columbia, of any Territory, of Puerto Rico, of the Virgin

Islands, of any county, of any municipality, or of any political subdivision thereof. The increase in insurance coverage from $5,000 to $10,000 per account will increase the number of accounts fully insured to the approximate figure of 98 percent of all accounts that were fully covered by insurance in 1934 when deposit insurance first became effective. Furthermore, such increase in insurance coverage should tend to benefit the smaller banks through encouraging the retention in such banks of deposits in excess of $5,000. The committee desires to call attention to the fact that the increase in insured deposits from $5,000 to $10,000 per individual account will only increase the insured deposit liability of the Corporation by some $12,000,000,000 or only approximately 15 percent.

Under existing law, "trust funds" are deposits, but they are not defined. The amendment defines such funds to include funds held as trustee, executor, administrator, guardian, or agent.

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Section 7 provides for assessments which the Corporation charges insured banks for deposit insurance. The assessment rate of one-twelfth of 1 percent per annum, which has been in effect since the enactment of the Banking Act of 1935, is continued unchanged. However, provision is made for an assessment credit formula. The formula permits the Corporation to retain up to 100 percent of the assessment income in any year if necessary to take care of losses in that year, and provides that any deficit must be restored from assessment income before assessment credits are granted or resumed. Based upon the Corporation's experience, in years of normal losses, the formula should permit a reduction in the assessments paid by banks in an amount approximating 55 percent of the assessment due under the basic assessment rate of one-twelfth of 1 percent per annum. The remaining portion of the assessment together with the Corporation's

income from other sources would permit the addition
214 of approximately $70 million annually to the surplus of the Corporation predicated upon 1949 income and expenditures.

Under the assessment credit formula the Corporation is required at the end of each calendar year beginning December 31, 1949, to credit pro rata to the insured banks 60 percent of its net assessment income for the calendar year, the remaining 40 percent to be transferred to the Corporation's surplus. The term "net assessment income" is defined as the total assessments less (1) operating costs and expenses of the Corporation for the calendar year; (2) additions made to reserves to provide for insurance losses during the year except that any adjustments to reserves which result in a reduction of such reserves shall be added; and (3) the insurance losses sustained in the year plus losses sustained in preceding years in excess of such reserves, provided that if the aggregate of these deductions exceed in amount the total assessments which become due during the calendar year, then the amount of such excess shall be restored by deductions from the total assessments becoming due in subsequent years. In respect to this formula it should be noted that deductions taken thereunder in computing the net assessment income are made from the total assessments which become due during the calendar year, rather than the actual assessment collections made during that year; also that the reserves set up thereunder are to provide for probable losses on assets of banks which have already been closed or which have received financial assistance from the Corporation. The committee desires to emphasize that the formula thus provides a flexible method for granting a reduction in the assessments paid by banks in normal years, and in bad years provides for payment of the full assessment if needed. This should reasonably protect the insurance fund in years of extraordinary losses.

The assessment base is continued on the total of the bank's deposits. However, in computing the assessment base, in addition to the present authorization to deduct therefrom uncollected items and trust funds deposited in another insured bank, the bill permits (a) the deduction from the deposit balance due to an insured bank the deposit balance due from such insured bank; (b) the inclusion in uncollected items of checks cashed over the counter; (c) the exclusion of outstanding drafts drawn on other banks and the advices used in lieu thereof; and (d) the exclusion of cash funds received and held exclusively as security for a liability to the bank. These deductions and exclusions are justified in that they will not materially reduce the assessment income but will save the banks considerable labor and expense in the maintenance of records and the preparation of assessment reports. Many of the smaller banks have not taken the present authorized deduction of uncollected items because of the disproportionate amount of work and expense involved. In respect to the exclusion relating to cash funds held as security, it should be noted that such funds in order to come within the exclusion, must be both received and held in the manner and for the purpose mentioned. The assignment of existing deposit accounts will not come within the exclusion.

The present law prescribes a semiannual assessment base of the average of the daily deposit liabilities of the bank for each semiannual period. The bill provides a semiannual assessment base of the average of the deposits for 2 days each semiannual period, March 31 and June 30 for the first semiannual period, and September 30 and December 31 for the second semiannual period. This change will also relieve the banks from considerable paper work, reduce expenses, and will not materially affect the assessment income.

215

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216-238 * * *

Plaintiff's Exhibit 3. 1-3

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FEDERAL DEPOSIT INSURANCE CORPORATION (Dec. 1950 Rev.)

INSTRUCTIONS TO ALL INSURED BANKS CONCERNING THE MAINTENANCE OF ASSESSMENT RECORDS AND THE PREPARATION OF CERTIFIED STATEMENTS

These instructions give pertinent information on the maintenance of assessment records and the computation of assessments pursuant to the provisions of the Federal Deposit Insurance Act, Public Law 797, approved September 21, 1950.

CERTIFIED STATEMENTS TO BE FILED BY ALL INSURED BANKS (Forms 545)

The FDI Act requires Certified Statements to be submitted on or before January 15 and July 15 of each year based upon deposits for the preceding six months ending December 31 and June 30, respectively.

The Law provides for only two base days in each six months' period. For the Certified Statement required to be filed on or before January 15, 1951, and each January 15 thereafter, the base days are the preceding September 30 and December 31. For the Certified Statement required to be filed on or before July 15, 1951, and each July 15 thereafter, the base days are the preceding March 31 and June 30. If any of these days is a non-business day or a legal holiday, either National or State, the preceding business day shall be used.

The alphabetical system of period designations for Certified Statements (Form 545), will be continued as in the past. For instance, the Certified Statement required to be filed on or before January 15, 1951 will be designated Form 545AE, the next one will be Form 545AF, followed by 545AG, etc. The original of the Certified Statement accompanied by the remittance due, should be forwarded to the FDIC. The copy should be retained for the bank's records.

Instruction A – DEPOSITS TO BE INCLUDED IN THE ASSESSMENT BASE

With the exception of the permitted exclusions designated (1), (2), and (3), below, all deposits as of the close of business on assessment base days must be included in the assessment base. In general, without limitation to the accounts specifically mentioned, this includes commercial, checking, savings, time and thrift accounts, certificates of deposit, and certified checks; outstanding cashiers' and other officers' checks, travelers' checks, and letters of credit, when issued for money or its equivalent; public funds including United States Government deposits whether secured or unsecured, deposits of other banks, special or specific purpose funds; and, all and every other type of deposit regardless of the amount in any individual account.

Trust funds, including funds held as trustee, executor, administrator, guardian or agent, escrow funds, and all similar types of accounts must be included in the total of deposit liabilities.

If overdrafts reduce the control of the total deposit liabilities, they must be added to the deposits in order to show the true amount thereof for assessment purposes.

Deposits of affiliated banks or other institutions in the reporting bank must be included in the base.

PERMITTED EXCLUSIONS FROM THE ASSESSMENT BASE

(1) Drafts drawn by a bank on its deposit accounts in other banks which are issued in the regular course of business need not be included in the assessment base. Likewise, the amount of any advices or authorizations issued by the bank for cash letters received directing that its deposit account in the sending bank be charged with the amount thereof, need not be included in the total of deposit liabilities.

(2) There may also be excluded from the assessment base cash funds which are received and held solely for the purpose of securing a liability to the bank, provided that such funds (a) are not subject to withdrawal by the obligor; and, (b) are carried in a special non-interest bearing account designated to properly show their purpose, and provided further, that the amount of the funds so excluded may not exceed the amount of the liability for which they are held as security.

Following are examples of cash funds which may be omitted provided they meet the foregoing general requirements:

(a) Repayment of principal on installment loans held as security for later application on the indebtedness.

(b) Money received and held as security to meet payment of an acceptance at its maturity, or to secure a reimbursement agreement given for the issuance of a letter of credit.

(c) Proceeds from the sale of collateral (including securities, accounts receivable and notes receivable) and cash dividends received on such collateral, held as security pending application on the indebtedness.

(d) Cash collateral held by the bank as security for an obligation of a borrower of securities from the bank to return the borrowed or like securities.

(e) Balance payable on purchase price of commercial paper discounted by the bank when such balance is held as security for any liability of the seller to the bank incurred in connection with such discount, sometimes known as "Dealer Reserves".

It must be observed that the cash funds which may be excluded from the total of deposit liabilities must be held *solely* for the purpose of securing a liability to the bank, must not be subject to withdrawal by the purchaser, must bear no interest, must not exceed the amount of the liability to the bank, must be set apart in a special account, and be properly designated to show their purpose.

(3) Any obligation of a bank which is payable only at an office of the bank located outside the States of the United States, the District of Columbia, any Territory of the United States, Puerto Rico, and the Virgin Islands need not be included in the total of deposit liabilities. Any insured bank having its principal place of business in any of the States of the United States or in the District of Columbia which maintains a branch in any Territory of the United States, Puerto Rico or the Virgin Islands and which has elected, in accordance with the procedure prescribed by law, to exclude from insurance its deposit obligation *payable only* at such branch may exclude from the assessment base such deposits payable only at such branch.

The net amount of deposit liabilities for assessment base days, after the exclusions explained above, should be inserted opposite Item A on Form 555 and transcribed to the Certified Statement.

DEDUCTIONS PERMITTED

From the total of deposits tabulated for assessment purposes, certain deductions may be claimed. (Please note that the paragraphs designated (1), (2), and (3) above relate to *exclusions*, i.e., accounts which need not be included in total of Deposits in Item A). The following relate to *deductions* which means (with the exception of checks and bank drafts for which cash or other consideration has been given) that the items must be first added to the total of deposit liabilities before they may be deducted.

The following items must be included in the total of deposit liabilities and may then be claimed as deductions in the spaces provided on the Certified Statement forms:

Instruction B – CASH ITEMS HELD FOR CLEARINGS (LOCAL EXCHANGES) *and* *Instruction C* – CASH ITEMS FORWARDED FOR COLLECTION (OUTSIDE EXCHANGES)

The term "cash item" means any instrument providing for the payment of money which the reporting bank has received in the regular course of business pursuant to an agreement under which the bank has given credit to a deposit account, and checks and bank drafts received and paid by it in the regular course of business: Provided, That the instrument, check or draft is in the process of collection and is payable on presentation: And, provided further, That the payor or drawee of the instrument, check or draft, is a bank or person other than the reporting bank, or a branch office or main office of the reporting bank other than the office where the item was received.

For the purpose of computing deductions for exchanges a check or bank draft is deemed paid by the reporting bank if the bank has given cash or other consideration therefor. Thus, checks and bank drafts cashed over the counter; received for payment or partial payments on notes receivable; received for the sale of securities owned by the bank: for credit to cash collateral accounts; or

the regular course of business: Provided, That the instrument, check or draft is in the process of collection and is payable on presentation: And, provided further, That the payor or drawee of the instrument, check or draft, is a bank or person other than the reporting bank, or a branch office or main office of the reporting bank other than the office where the item was received.

For the purpose of computing deductions for exchanges a check or bank draft is deemed paid by the reporting bank if the bank has given cash or other consideration therefor. Thus, checks and bank drafts cashed over the counter; received for payment or partial payments on notes receivable; received for the sale of securities owned by the bank; for credit to cash collateral accounts; or checks or bank drafts for which the bank has given cash, credit, or other consideration, are eligible for deduction.

There are two ways of computing deductions for exchanges, either of which may be used at the option of the bank but the method selected must be used for the full semiannual period in computing both local and outside exchanges.

Alternate method (aa) – By multiplying by 2 the total of the cash items forwarded for collection on the assessment base days which were received on said days and the cash items held for clearings at the close of business on said days which were received on said days.

Alternate method (bb) – By deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings at the close of business on said days plus uncollected cash items paid or credited on preceding days.

If alternate method (bb) is used by a bank or branch located in a Federal Reserve district, the maximum period of deduction shall be: (1) Cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligible for deduction for the base day; (2) Cash items forwarded for collection on the preceding days which remain uncollected as of the close of business on the assessment base day shall be eligible for deduction for the base day, Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time necessary to send the item in due course to the Federal Reserve bank of the Federal Reserve district or the branch of the subdistrict thereof in which the reporting bank is located, plus the time allowed for collection from the place where the item is payable, as shown on the current Time Schedule of such Federal Reserve bank or branch thereof. No cash item shall be deducted after the bank has had advice that the item has been paid or dishonored.

If alternate method (bb) is used by any insured bank or branch located outside any Federal Reserve district, the maximum period of deduction shall be: (1) Cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligible for deduction for the base day; (2) Cash items forwarded for collection on preceding days which remain uncollected at the close of business on the assessment base day shall be eligible for deduction for the base day, Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time from the date the cash item is paid or credited to a deposit account and the date of receipt (in the usual course of business) by the correspondent bank to which the item is forwarded for collection plus (a) the collection time allowed by the Federal Reserve time schedule for the district in which the correspondent bank is located or (b) the actual collection time, where the collection time is not included in the Federal Reserve time schedule. No cash item shall be deducted after the bank has had advice that the item has been paid or dishonored.

EXAMPLE OF DEDUCTION – ALTERNATE METHOD (bb)

An example of the computation, of the deduction for a base day (December 31), is given below:

Bank A had sent out the following Cash Letters for collection on December 31, and on the two preceding days as follows:

	Dec. 29	*Dec. 30*	*Dec. 31*
Two day items	$ 11,500	$ 10,000	$ 9,000
Three day items	15,000	12,500	13,000
Totals	$ 26,500	$ 22,500	$ 22,000

Bank A had received Local Clearings on December 31, which it had on hand (uncollected) at the close of business in the amount of $7,000.

The deduction under Alternate Method (bb) for the items illustrated above would be $66,500 calculated as follows:

	Amount
Two day items of Dec. 29 (collected by end of base day)	none
Three day items of Dec. 29 (uncollected by end of base day)	$ 15,000
Total of both letters of Dec. 30 (uncollected by end of base day)	22,500

Bank A had received Local Clearings on December 31, which it had on hand (uncollected) at the close of business in the amount of $7,000.

The deduction under Alternate Method (bb) for the items illustrated above would be $66,500 calculated as follows:

	Amount
Two day items of Dec. 29 (collected by end of base day)	none
Three day items of Dec. 29 (uncollected by end of base day)	$ 15,000
Total of both letters of Dec. 30 (uncollected by end of base day)	22,500
Total of both letters of Dec. 31 (uncollected by end of base day)	22,000
Local Clearings Received on Dec. 31 (uncollected by end of base day)	7,000
Total Deductions for base day – Dec. 31	$ 66,500

Instruction D – TRUST FUNDS REDEPOSITED IN OTHER INSURED BANKS

Trust funds held by a bank in a fiduciary capacity and which are deposited in other insured banks may be claimed as a deduction. Such trust funds must be included in the total of deposit liabilities to be eligible for deduction. Trust funds are defined in the law as funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent.

Instruction E – RECIPROCAL BANK BALANCES

The bank may deduct from the deposit balance *due to* an insured bank the deposit balance *due from such* insured bank (other than trust funds deposited by it in such bank), provided that such deposit balances are *subject to immediate withdrawal* and provided further, that such deductions may not be made in excess of the lesser of the two accounts. The deposit balances so offset must be subject to withdrawal on demand. Only established credits (not tentative credits evidenced by uncollected items) may be used in computing such deduction.

To illustrate, assume that Bank A is computing its assessment and shows on its books a balance *subject to immediate withdrawal* due to Bank B of $50,000. It also has a balance *subject to immediate withdrawal* on deposit with Bank B in the amount of $40,000. Bank A may claim a deduction of $40,000 under this provision.

On the other hand, if these amounts are reversed, that is, assuming Bank A has a deposit due to Bank B subject to immediate withdrawal in the amount of $40,000 and Bank A has a deposit with Bank B subject to immediate withdrawal of $50,000, Bank A can claim a deduction of $40,000. Although Bank A's balance at Bank B is $50,000, Bank A cannot deduct more than the $40,000 on deposit with Bank A.

It is important to remember that only the reciprocal balances between the two specific banks concerned are eligible for deduction. This does not permit the deduction of the entire amount of "due from" bank balances from the entire amount of the "due to" bank balances.

Instruction F – NONASSESSABLE ITEMS - INCLUDED IN ITEM A

If any items or accounts, which are not assessable, are included in the total of deposit liabilities which are carried forward to Item A, Total Deposit Liabilities (Form 545) they may be deducted under Item F. The following are some examples:

1. Cashier's Checks for the bank's own purposes, e.g.; purchase of securities for the bank's own portfolio; for the purchase of currency from correspondent banks; for the payment of Officers' salaries, wages, operating expenses; and, for the payment of dividends on bank's own stock.
2. The bank's own tax reserve accounts.
3. Loan commitment accounts, provided that they only represent a commitment to grant a loan and that there is no liability on the part of the borrower for the commitment established.
4. Liability accounts, representing Bank's own expenses.

Any deductions claimed under Item F of the statement must be explained in the space provided on the Certified Statement Form or on a separate schedule if necessary.

Instruction G-J – COMPUTATION OF THE ASSESSMENT AND THE ASSESSMENT RATE

The total of the deposit liabilities for the two base days in each semiannual period should be carried out into the right-hand column of the Certified Statement as Item A. The totals of the deductions claimed for the two days should also be carried out into the right-hand column as Item G. The deductions for the two base days, Item G, should then be subtracted from the total deposits for the two days, Item A, and the remainder listed as Item H. This should then be divided by two to arrive at the assessment base, Item I.

The assessment rate is 1/12th of 1% per annum. One-half of this amount is due for each six months. Accordingly, in computing the assessment, the assessment base, Item I should be multiplied by ½ of 1/12th%. The assessment due should be inserted in Item J.

The total of the deposit liabilities for the two base days in each semiannual period should be carried out into the right-hand column of the Certified Statement as Item A. The totals of the deductions claimed for the two days should also be carried out into the right-hand column as Item G. The deductions for the two base days, Item G, should then be subtracted from the total deposits for the two days, Item A, and the remainder listed as Item H. This should then be divided by two to arrive at the assessment base, Item I.

The assessment rate is 1/12th of 1% per annum. One-half of this amount is due for each six months. Accordingly, in computing the assessment, the assessment base, Item I should be multiplied by ½ of 1/12th%. The assessment due should be inserted in Item J.

Instruction K-M – CREDITS TO BE PRORATED TO INSURED BANKS

The law provides that as of December 31, 1950, and as of December 31 of each year thereafter, the Corporation shall credit 60% of its net assessment income pro rata to the insured banks based upon the assessments of each bank during said calendar year. (See Section 7 (d) of the Federal Deposit Insurance Act).

Prior to July 1 of each year the Corporation will advise each insured bank of the amount of its credit. This credit should be inserted by the bank as Item K-1 on its Certified Statement to be submitted on or before July 15. If this credit is less than the assessment due, the difference should be inserted as Item L and a remittance therefor submitted with the Certified Statement. If the credit is greater than the assessment due, the excess should be inserted as Item M on the Certified Statement and such net credit may be deducted from the assessment due on the next Certified Statement to be submitted on or before the following January 15.

(Items K to M appear only on the Certified Statements to be filed on or before July 15.)

RECORDS TO BE MAINTAINED

Each insured bank must maintain the records necessary to properly show the computation of the assessment base as of the assessment base days including adequate records to support any deductions claimed.

Form 555, Tabulation of Assessment Base, must be maintained by every insured bank for the four assessment base days in each year.

Instructions relating to assessments to be paid by newly insured banks, banks whose deposits have been assumed by another insured bank, banks entering voluntary liquidation, and banks which are consolidating, may be obtained from the Fiscal Agent of the Corporation upon request.

August 2, 1937.

Continental Illinois National
Bank & Trust Company of
Chicago, Illinois

Gentlemen:

Examination of the recapitulation of deposit liabilities for assessment base (Forms 555B, 555C and 555D) submitted by you for the three six month periods ending June 30, 1937, shows that you have claimed deductions in Column F for "reciprocal accounts". These deductions were as follows:

Form 555B—Six months ending 6/30/36, $1,925,543,307.
Form 555C—Six months ending 12/31/36, $1,998,920,847.
Form 555D—Six months ending 6/30/37, $1,942,966,471.

It was also noted that you claimed a deduction of $1,080,521,948. on Form 555A, the recapitulation of totals for the three months ending December 31, 1935; and, that this amount included a deduction of $353,600,692. for the month of October 1935. No explanation of these deductions was given but it it assumed that they represent, in part, deductions for "reciprocal accounts".

You are advised that deduction of these items is not legally authorized. Where a bank carries two or more accounts with another bank, it is required to report in its totals for assessment base the credit balance shown in any one or more of such accounts, and may not deduct from such balance(s) or claims as a deduction the debit balance shown in any account or accounts with the same bank. Debit balances of one bank, of course, may not be deducted from the credit balance of another bank, thereby arriving at a net deposit liability on account of other banks.

You are requested to submit the following:
Amended Certified Statements of your assessments on the enclosed Forms 545, 545A, 545B, 545C and 545D;
Amended Recapitulations of totals on the enclosed Forms 555A, 555B, 555C and 555D;
244 An explanation of the deductions claimed in Column F on the Form 555A originally submitted;
An explanation of the deductions claimed in Column F for the month of October 1935 on the Form 555A originally submitted;
A remittance for the additional assessment payments due.

Yours very truly,
/s/ W. G. Loeffler
W. G. Loeffler,
Fiscal Agent.

245 PLAINTIFF'S EXHIBIT 5

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO
(Filed Dec 3, 1956)

Chicago September 9, 1937

Federal Deposit Insurance Corporation,
Washington,
D. C.

Dear Sirs:

In compliance with your letter of August 2, 1937, we are enclosing amended reports as follows:

Amended Certified Statements of Assessments on forms 545, 545A, 545B, 545C, and 545D.
Amended Recapitulations of totals on forms 555A, 555B, 555C, and 555D.

The deductions claimed in Column F on form 555A originally submitted consisted of:

Cashier's Checks, Our Own Funds	$ 16,526,031
Own Funds in Deposits	159,144,274
P. I. D. arrangements	12,875,952
Reciprocal Accounts	891,975,691

These deductions for October 1935 were:

Cashier's Checks, Our Own Funds	$ 3,245,373
Own Funds in Deposits	50,474,872
P. I. D. arrangements	7,213,838
Reciprocal Accounts	292,666,609

We are also enclosing our check for $639.35 to cover the additional insurance as shown by the amended returns.

Yours very truly,

/s/ Frank L. King

Comptroller

FLK:GW

Encl.

(p. 150 - Blank)

540/667

FEDERAL RESERVE BANK
OF CHICAGO

Operating Circular No. 5
Revised January 1, 1950

CHICAGO HEAD OFFICE TIME SCHEDULE

To the Member and Nonmember Clearing Banks in the Seventh Federal Reserve District (except banks in the territory assigned to the Detroit Branch):

This circular applies only to member and nonmember clearing banks located in the territory assigned to our head office in Chicago.

As heretofore, cash items sent to us by member and nonmember clearing banks in the territory assigned to our head office should be sent to Chicago, except that such banks may at their option send cash items payable in the territory assigned to our Detroit Branch either to Chicago or to our Detroit Branch.

Credit for cash items received and accepted at head office

Credit is subject to applicable closing times and to the sorting requirements shown in subsequent schedules. Credit for items not received within the applicable closing times will be deferred one additional day. When items for which there are different closing

items payable in the territory assigned to our Detroit Branch either to Chicago or to our Detroit Branch.

Credit for cash items received and accepted at head office

Credit is subject to applicable closing times and to the sorting requirements shown in subsequent schedules. Credit for items not received within the applicable closing times will be deferred one additional day. When items for which there are different closing times are not separately sorted and listed, credit for all such items may be deferred for the longest time for which credit may be deferred for any of such items as herein provided.

Immediate credit

Immediate credit will be given for the following items when received within the applicable closing time:

When received in time for presentment through the Chicago Clearing House (Monday through Friday)—

Items drawn on Chicago banks
Such items will be handled in accordance with the rules and practices of the Chicago Clearing House Association.

When received by 10 a. m. (Monday through Friday)—
Checks on the Treasurer of the United States (items $500.00 and over 12 noon).

When received by 2 p. m. (Monday through Friday)—
Checks on the Federal Reserve Bank of Chicago
Officers' checks of other Federal Reserve Banks
Federal Reserve Exchange Drafts.

Deferred credit

Credit for all other items when received within the following applicable closing times will be given as specified in the availability schedule below:

Items payable outside of the City of Chicago—

When received by 1 p. m. (Items $1,000.00 and over 4 p. m.) Monday through Friday. Saturday, not also a legal holiday, 12 noon but with the understanding that any such checks received after 10:30 a. m. to be processed on Saturday may or may not be forwarded for collection until the following business day.

AVAILABILITY SCHEDULE

— STATES — Number of business days deferred	— CITIES — Number of calendar days deferred	
	—1—	—2—
COLORADO ILLINOIS INDIANA IOWA KANSAS KENTUCKY MICHIGAN MINNESOTA MISSOURI MONTANA NEBRASKA NORTH DAKOTA OHIO SOUTH DAKOTA	2*	Atlanta Birmingham Buffalo Charlotte Cincinnati Cleveland Dallas Denver Detroit Helena Kansas City Little Rock Louisville Memphis	Baltimore Boston El Paso Houston Jacksonville Los Angeles New Orleans Philadelphia Portland Richmond San Antonio San Francisco Seattle
MICHIGAN MINNESOTA MISSOURI MONTANA NEBRASKA NORTH DAKOTA OHIO SOUTH DAKOTA WISCONSIN WYOMING	2*	Dallas Denver Detroit Helena Kansas City Little Rock Louisville Memphis Minneapolis Nashville New York Oklahoma City Omaha Pittsburgh St. Louis St. Paul Salt Lake City	New Orleans Philadelphia Portland Richmond San Antonio San Francisco Seattle
ALL OTHERS: 3*			

* Should earlier availability be desired on Federal Reserve and branch bank cities, it can be obtained by preparing a separate letter for each of the two groups shown in the adjoining columns.

Checks drawn on banks not located in a Federal Reserve city but bearing upon their face a notation that they are payable at or receivable for immediate availability in a Federal Reserve city will be accepted on the same basis as checks drawn on banks located in that city.

Sorting requirements

Member and nonmember clearing banks may be required, if volume warrants, to sort cash items which they send to the head office of the Federal Reserve Bank of Chicago into the following classes, with a separate letter and total for each class:

A. Immediate-credit items, which may be subdivided into
   1. Checks on the Treasurer of the United States
   2. All other immediate-credit items

B. Deferred-credit items, which may be subdivided into
   1. Items payable in the State of Illinois
   2. Items payable in the State of Indiana
   3. Items payable in the State of Iowa
   4. Items payable in the State of Michigan
   5. Items payable in the State of Wisconsin
   6. Items payable in other Federal Reserve districts, which may be subdivided into
      a. One-day points
      b. Two-day points
      c. Three-day points

Credit for cash items sent direct to other Federal Reserve banks

Member and nonmember clearing banks, which have received permission to send cash items payable in other Federal Reserve districts direct to other Federal Reserve banks for account of the Federal Reserve Bank of Chicago (head office), will be given credit for items so sent as specified below:

1. Items payable in Federal Reserve bank or branch cities—

   Based on the time (not in excess of three business days) normally required for the collection thereof as indicated in separate availability schedules furnished to the respective

[redacted] Reserve Bank of Chicago (head office), will be given credit for items so sent as specified below:

1. Items payable in Federal Reserve bank or branch cities—

   Based on the time (not in excess of three business days) normally required for the collection thereof as indicated in separate availability schedules furnished to the respective direct-sending banks;

2. Items payable in localities outside of Federal Reserve bank or branch cities—

   After the same number of days from the dispatch thereof as credit is deferred for similar items after receipt thereof at the head office;

provided, however, that the Federal Reserve Bank of Chicago may, by giving notice to such effect to any member or nonmember clearing bank, prescribe how, and the time or times before which, all items or certain items must be dispatched by such bank in order to obtain such credit.

GENERAL PROVISIONS

Time of presentment

We do not by this circular, or otherwise, agree to present any item or to cause any item to be presented, earlier than such item is required to be presented in the exercise of ordinary care, under the provisions of the Negotiable Instruments Law of Illinois.

Effect of Saturday closing and holidays upon availability

When the day on which credit would otherwise be given pursuant to this circular is a Sunday, or a Saturday or legal holiday for the Federal Reserve Bank of Chicago, credit will be given on the following business day.

Credit for transfer drafts

Credit will be given for drafts drawn by member or nonmember clearing banks on their commercial bank correspondents based on actual transit time, whether received at our head office or our Detroit Branch or sent for our account direct to the Federal Reserve bank in the district where such draft is payable. Such drafts, when sent direct to other Federal Reserve banks, should be sent with separate cash letters; and separate advices (marked "Transfer Drafts") of such direct sendings should be sent to the head office or Detroit Branch.

Revision of this circular

We reserve the right at any time, with or without notice, to revoke, modify, amend, or add to, this circular or any provision thereof, effective as to all or any particular member and nonmember clearing banks.

Effect of this circular on previous circular

This circular supersedes our Operating Circular No. 5 dated August 6, 1949 and Supplement No. 1 dated October 1, 1949.

C. S. YOUNG,
President.

(249)

Your balance to our credit — Our balance to your debit

STATEMENT OF YOUR ACCOUNT WITH

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

H Church Street Station
New York 15, New York

Unless otherwise, forgeries, errors or other discrepancies are reported to us within ten days from the receipt hereof, we shall consider that you acknowledge this statement to be correct. Please examine carefully and report exceptions at once to our Auditing Division.

CHECKS	DEPOSITS	DATE	NUMBER OF CHECKS	THE LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE
BALANCE BROUGHT FORWARD		JUN 23 50	2	511,152.84 *
	9,748.48			
	2,045.04			
	12,600.52	JUN 26 CL		535,547.80 *
402.41-E 5,775.64-\	125.00			
	250.00			
	17.50			
	1,000.00			
	41,805.00			
	83,386.00	JUN 26 50	2	755,953.33 *
2,381.36-* 250.00-\	1,941.48			
	50.00	JUN 27 50	2	755,313.45 *
200,000.00-* 364.00-\	10,705.18			
	470.40			
		JUN 28 CL	2	566,125.03 *
	412.50			
	400.00			
	20.00			
	8.75			
	35.00			
	369.00	JUN 28 50		567,370.28 *
42.01-\ 134.56-\	9,421.77	JUN 29 CL	2	576,615.48 *
11,888.56-\		JUN 29 50	1	564,726.92 *
EC 68.45-\	4,451.66			
	392.39	JUN 30 CL	1	569,502.52 *
	EC 63.45	JUN 30 CL		569,570.97 *
69.32-* 5,772.09-\	17,791.33			
	32,094.00	JUN 30 50	2	613,614.89 *

SYMBOLS USED: EC – Entry Corrected RET – Item Returned LST – List of Checks

Plaintiff's Exhibit 8

CHECKS
CC - CERTIFIED CHECKS
DM - DEBIT MEMO
RT - RETURNED ITEM
LST - LIST
EC - ERROR CORRECTED

Continental Illinois National Bank &
Trust Company of Chicago,
Lock Box H,
Chicago 90, Illinois

DEPOSITS
CC - COLLECTIONS
L - LOANS - DISCOUNT
CM - CREDIT MEMO
EC - ERROR CORRECTED
M-CASH LETTER

OD - OVERDRAFT

IN ACCOUNT WITH [redacted]

FIFTY-FIVE BROAD STREET
NEW YORK 15, N.Y.

THE MAINTENANCE OF THIS ACCOUNT IS SUBJECT TO THE TERMS, CONDITIONS AND LIMITATIONS APPEARING IN THE DEPOSITOR'S CONTRACT ON THE REVERSE SIDE HEREOF

PLEASE NOTIFY US PROMPTLY OF CHANGE IN ADDRESS

CHECKS	DEPOSITS	DATE	BALANCE
	BALANCE BROUGHT FORWARD		[illegible]73.29*
DM [illegible]00.00	[illegible]	[illegible]	[illegible]754.85*
	[illegible]	[illegible]30'50	[illegible]34,337.99*
DM 5,000,000.00	[illegible]000,000.00	JUN 30'50	[illegible]34,337.99*
		JUN 30'50	134,337.99*

5461/67

252

JUN 30 1950

YOUR ACCOUNT WITH

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

231 SOUTH LA SALLE STREET CHICAGO 90, ILLINOIS TELEPHONE STATE 2-9000

P.O. Box 656
Pittsburg 30, Pennsylvania.

Unless alterations, forgeries, errors or other discrepancies are reported to us within ten days from the receipt hereof, we shall consider that you acknowledge this statement to be correct. Please examine carefully and report exceptions at once to our Auditing Division.

CHECKS	DEPOSITS	DATE	NUMBER OF CHECKS	THE LAST AMOUNT IN THIS COLUMN IS YOUR BALANCE
BALANCE BROUGHT FORWARD ☞		SEP2952	6	3,676,835.55
	1,518.49			
	1,969.59	SEP2952	6	3,680,323.63*
		SEP2952	7	3,680,313.53*
	6,354.73			
	224,412.50			
	437.41			
	6,905.31			
	200,000.00			
	202,271.76			
	5,855.89			
	200,000.00			
	500,000.00	SEP3052	6	2,312,596.12*

202,271.76
5,855.89
200,000.00
500,000.00 SEP3052 6 2,312,596.12*

1-48

SYMBOLS USED: EC – Entry ... RET – Item Returned LST – List of Checks

158

Plaintiff's Exhibit 10

TO

Continental Illinois National Bank
and Trust Company of Chicago,
Lock Box 11,
Chicago 90, Illinois.

IN ACCOUNT WITH [redacted]
PITTSBURGH

CHARGES	CREDITS	DATE	BALANCE
	BALANCE BROUGHT FORWARD	SEP 30 52	1,195,869,11
TR 406,000,00	CL 6,707.50		
	TR 206,000,00		
	CL 96,397.46		
	CL 97,15	SEP 30 52	1,093,146,30

546,1667

EXPLANATION OF SYMBOLS

CL – COLLECTIONS
CP – COUPONS
CY – CURRENCY
DS – DRAFT
RM – REMITTANCE
RT – RETURN ITEMS
ST – SPECIAL TRANSACTION
TR – TRANSFER

255

TO

Continental Illinois National Bank
and Trust Company of Chicago,
Lock Box H,
Chicago 90, Illinois.

PITTSBURGH

CHARGES	CREDITS	DATE	BALANCE
	BALANCE CARRIED FORWARD	JUN 15 70	1,081,053.21
	CL 150,000.00		
	CL 775.61	JUN 16 70	1,231,828.82
CL 400,000.00	CL 2,500,000.00		
	CL 762.50	JUN 19 70	3,132,591.32
	CL 200,000.00		
	CL 840.00	JUN 20 70	3,333,431.32
CL 44	CL 150,000.00		
CL 2,700,000.00	CL 2,339.31	JUN 21 70	3,485,770.63
	CL 25,000.00		
	CL 1,004.50		
	CL 815.00		
CL 300,000.00	CL 150,000.00	JUN 22 70	1,162,590.13
	CL 200,000.00	JUN 23 70	1,062,590.13
	CL 1,096.00	JUN 26 70	1,063,686.13
	CL 150,000.00		
	CL 696.00		
	CL 500.00		
	CL 1,325.00	JUN 27 70	1,216,207.13
	CL 696.00		
	CL 684.00	JUN 28 70	817,587.13
	CL 684.00	JUN 29 70	818,271.13
	CL 1,096.00	JUN 30 70	819,367.13
	CL 683.75	JUL 3 70	820,050.88
	CL 150,000.00	JUL 6 70	970,050.88

EXPLANATION OF SYMBOLS

CL – COLLECTIONS
CP – COUPONS
CV – CURRENCY
DS – DRAFT
RM – REMITTANCE
RT – RETURN ITEMS
ST – SPECIAL TRANSACTION
TR – TRANSFER

256

257 DEFENDANT'S EXHIBIT 1
(Filed Dec. 3 1956)

June, 1942.

TREASURY DEPARTMENT
Office Of Comptroller Of The Currency
Washington

Read Carefully And Preserve For Future Reference

INSTRUCTIONS REGARDING THE REPORTING OF RECIPROCAL INTERBANK BALANCES IN CALL REPORTS OF CONDITION (FORM 2130)

Beginning with the current call, reciprocal interbank demand deposits with banks in the United States, except private banks and American branches of foreign banks, should be reported net, instead of gross as required heretofore; and the general instructions for the preparation of reports of condition contained in Form 2130-C pertaining to item 2 in Schedule "D" and item 4 in Schedule "E" are modified accordingly. Reciprocal interbank deposits arise when two banks maintain deposit accounts with each other, i.e., each bank has both a "due from" and a "due to" account with the other bank.

In determining the net amount due from or due to each other bank with which reciprocal deposits are maintained, all demand deposi accounts with each such bank should be combined except (1) accounts that do not include any collected funds but merely represent cash items in process of collection and (2) balances standing to the credit of a bank's trust department. The reciprocal amount should then be subtracted from "due from" anl "due to"; and the amount thus subtracted should be shown in the parenthetical space provided for the purpose following item 2 in Schedule "D" and item 4 in Schedule "E". In other words, the balance due from a bank should be subtracted from both assets and liabilities if it is less than the balance due to the same bank; and vice versa.

Following is an illustration of reciprocal interbank demand accounts: Bank A has a demand deposit of $1,000,000 with Bank B, and Bank B has a demand deposit of $200,000 with Bank A. On a "net" basis, as now required, Bank A will report only $800,000 as due from Bank B and nothing as due to Bank B; conversely, Bank B will report only $800,000 as due to Bank A and nothing as due from Bank A. In addition, both banks will show $200,000 in the parenthetical spaces provided for the purpose following the captions of item 2 in Schedule "D" and item 4 in Schedule "E".

258 DEFENDANT'S EXHIBIT 2
Filed Dec 3 - 1956)

FEDERAL RESERVE BANK OF CHICAGO

Circular No. 1087
July 1, 1942

CHANGE IN MANNER OF PREPARING REPORTS OF DEPOSITS FOR RESERVE COMPUTATION PURPOSES WITH RESPECT TO RECIPROCAL INTERBANK BALANCES.

To All Member Banks of the
Seventh Federal Reserve District:

In order that the member bank reports of deposits for reserve computation purposes may continue to be consistent with the call reports, the formula for computation of reserves has been amended to the effect that reciprocal interbank demand balances with banks in the United States, except those with private banks and American branches of foreign banks, hereafter are to be reported Net instead of Gross. Therefore, if you maintain any such accounts on your books, kindly prepare all deposit reports on the new basis, effective immediately.

Reciprocal interbank deposits are defined as balances which arise when two banks maintain deposit accounts with each other, each bank having both a "Due From" and a "Due To" account with the other bank.

In instances where the books of a member bank having more than one reciprocal interbank demand account reflect net "Due To" balances for some accounts and net "Due From" balances for others, the aggregate of each such class of Net balances should be included under the respective columns Nos. 1 and 2-B of the deposit reports.

Very truly yours,
C. S. Young
President

355 UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1667) * *

MEMORANDUM
(Filed June 20, 1956)

This Court has carefully examined and considered the pleadings, the evidence, the briefs, and argument of counsel.

It is the view of this Court that the defendant is entitled to exclude the reciprocal bank balances in determining the deposits for assessment purposes.

The contention of the defendant that the pertinent provisions of the 1950 statute merely clarify the previous statute is sustained.

The contract reserve balances, the payroll deductions and the withholding taxes are not deductible in determining the amount of deposits for assessment purposes.

It is the view of this Court that the defendant is entitled to deduct the uncollected cash items in determining

the amount of deposits for assessment purposes. The
356 liability of the defendant for these cash items is only conditional and does not become fixed until the item is finally paid. It appears to this Court that the defendant's contention is sustained by the fact that the plaintiff recognized the defendant's practice in its issuance and promulgation of the regulation of March 31, 1944, without any change by Congress of the language of Section 7a of the 1950 Act.

The defendant is entitled to deduction for the amount of government bonds which were cashed by it but which were outstanding for collection on the base days in question.

The defendant will prepare and present appropriate findings of fact, conclusions of law and judgment order in open court on August 28, 1956, at 10:00 A.M.

Enter:

/s/ J. S. Perry

Judge

Dated: June 20, 1956.

357

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—No. 54 C 1667) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming on for trial before the Court without a jury, the parties having appeared by their respective counsel and the issues having been duly tried, the Court having considered the stipulation of the parties, their respective briefs, and the evidence introduced by them in open court, and having heard the arguments of counsel, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

A stipulation of facts agreed to by the parties and signed by their respective attorneys was filed herein
358 on November 21, 1955 and is hereby adopted as the Findings of Fact by the Court.

In addition the Court finds that the volume of cash items referred to at page 9, et seq. of the stipulation as handled by defendant during the year 1952, which was a typical year, averaged 632,274 items on Mondays, and 366,500 items on Saturdays, with a maximum of 771,564 items on Mondays, and a maximum of 468,524 items on Saturdays.

Defendant in open court admitted liability as to $82,283.52 of the $177,448.46 claimed by plaintiff in its complaint, and has paid that amount to plaintiff, thus leaving in controversy a balance of $95,164.94, consisting of the following items:

(1) the contract reserve balances referred to in paragraph 10b of the complaint;

(2) the reciprocal bank balances referred to in paragraph 10a of the complaint;

(3) the deductions and withholding taxes referred to in paragraph 10c of the complaint; and

(4) the uncollected cash items referred to in paragraphs 10d, 10e and 10f of the complaint, and including deductions from deposit liabilities for the amounts of Series E Government Bonds cashed by defendant on
359 various base days covered in reports for the period from July 1, 1950 through June 30, 1953.

CONCLUSIONS OF LAW.

1. Plaintiff, Federal Deposit Insurance Corporation (hereinafter sometimes referred to as the "Corporation"), is a corporation duly organized and existing under and by virtue of an Act of Congress, 12 U.S.C. § 1811 (designated as the Federal Deposit Insurance Act) with its principal place of business in the City of Washington, District of Columbia.

2. The jurisdiction of this court arises under Title 12 U.S.C. § 1819 (Fourth) which provides that all suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States.

3. Defendant, Continental Illinois National Bank And Trust Company of Chicago, is a duly chartered and organized national banking association with its principal place of business in Chicago, Illinois, and was at all times pertinent herein an insured bank and a national member bank as defined by Title 12, U.S.C. § 1813.

4. This action arises under a law of the United States, the Banking Act of 1933 (48 Stat. 168; U.S.C., Title 12, § 264), as amended by the Banking Act of 1935 (49 Stat. 684; U.S.C., Title 12 § 264), and as further amended by the Federal Deposit Insurance Act of 1950 (64 Stat. 873; U.S.C., Title 12, §§1811-1831) (sometimes hereinafter referred to as "The Act").

5. This is an action for a declaration of rights and for such further relief as may be granted pursuant to the provisions of the Federal Declaratory Judgment Act of June 25, 1948 (62 Stat. 964; U.S.C., Title 28, §§2201-2202), and The Act. An actual controversy exists between the plaintiff and the defendant with respect to the matters herein alleged, and the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00).

6. Pursuant to and in compliance with The Act the Board of Directors of plaintiff Corporation has from time to time adopted rules and regulations pertaining to the filing of Certified Statements and to reporting collection and payment of assessments (12 C.F.R. Parts 304, 327, as amended at 15 F.R. 8630-8632, 8638-8639 and at 19 F.R. 1663-1665).

7. Defendant is entitled under the applicable provisions of Section 7(a) of The Act, as amended September 21, 1950, to deduct twice the amount of the cash items drawn on out-of-town banks, which it received after
361 the close of its books on the last business day immediately preceding the assessment base day, and which it forwarded for collection prior to the base day and credited to its depositors on the base day. These cash items remained uncollected on the base day. The propriety of such deduction was recognized by the regulations published March 27, 1954, effective March 30, 1954, by plaintiff without any change in the statutory provisions, and recovery should be denied plaintiff as to said items.

8. Defendant is entitled under the provisions of Section 7 (a) of The Act, as amended September 21, 1950, to deduct from its liability for deposits twice the amount of uncollected cash items drawn on out-of-town banks, received by defendant and credited to its depositors on the assessment base day and which were forwarded for collection in the regular course of business subsequent to the base day. The 1954 regulations which allow such deductions and which were issued without any change in the statute, support defendant's interpretation of this section. Plaintiff should be denied recovery as to said cash items.

9. Defendant is entitled to deduct from its deposit liability on base days, under the express language of Section 7 (a) (1) of The Act, twice the amount of cash items

credited to depositors of defendant and forwarded
362 for collection on the base days but received prior thereto and after the close of the last business day preceding the base day, and recovery should be denied plaintiff as to said cash items.

10. Defendant is entitled to deduct as cash items under Section 7 (a) of The Act, the amount of Series E Government Bonds cashed by defendant which were outstanding for collection on the base days in question, and recovery should be denied plaintiff as to said items.

11. Defendant is entitled to exclude the amount of reciprocal bank balances in determining the amount of its liability for deposits for assessment purposes. The 1950 amendment to Section 7 (a) of The Act expressly allowing a bank to deduct from the deposit balance due to an insured bank the deposit balance due from such insured bank merely clarified the pre-existing law, and under The Act, even prior to its amendment, defendant was entitled to deduct from the gross amount of deposits made in it by anonther bank the amount of defendant's deposits in such other bank. Action consistently taken by federal agencies regulating banks under their jurisdiction confirms the propriety of this exclusion. Thus, on July 1, 1942, the Federal Reserve Bank of Chicago instructed its member banks as follows:

363 "In order that the member bank reports of deposits for reserve computation purposes may continue to be consistent with the call reports, the formula for computation of reserves has been amended to the effect that reciprocal interbank demand balances with banks in the United States, except those with private banks and American branches of foreign banks, hereafter are to be reported Net instead of Gross."

And in June 1942 the Comptroller of the Currency directed national banks as follows:

> "Reciprocal interbank deposits arise when two banks maintain deposit accounts with each other, i.e., each bank has both a 'due from' and a 'due to' account with the other bank.
>
> "In determining the net amount due from or due to each bank with which reciprocal deposits are maintained, all demand deposit accounts with each bank should be combined except (1) accounts that do not include any collected funds but merely represent cash items in process of collection; and (2) balances standing to the credit of a bank's trust department. The reciprocal amount should then be subtracted 'due from' and 'due to'; and the amount thus subtracted should be shown * * *. In other words, the balance due from a bank should be subtracted from both assets and liability if it is less than the balance due the same bank; and vice versa."

Plaintiff is accordingly not entitled to recover with respect to this item.

12. Defendant is not entitled to deduct from the amount of its deposits amounts held in the so-called contract reserve account, and such items constitute a "deposit" within the meaning of The Act, and plaintiff 364 is entitled to recover $2,442.52 with respect to this item.

13. Defendant is not entitled to exclude from its assessment base the amounts deducted from salaries of its employees and held by defendant (a) for payment of Federal Income Taxes on their salaries; (b) for payment of Federal Social Security Taxes; (c) for payment of employees' contributions for life insurance premiums, and (d) for purchase of Government securities for such em-

ployees, and plaintiff is entitled to recover the sum of $883.10 as to these items.

It Is Therefore Ordered And Adjudged that plaintiff recover from defendant the sum of $3,325.62, with interest thereon at the rate of 2% from September 23, 1954, without costs.

Enter:

/s/ J. S. Perry

Judge

Dated: September 7, 1956.

365

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 54 C 1667) • •

JUDGMENT

At Chicago, Illinois in said Division and District, on September 7, 1956.

This cause having come on to be heard upon the pleadings and proofs, and having been argued by the parties, upon consideration thereof, and upon the findings of fact and conclusions of law entered herein on this day,

1. It is ordered, adjudged and decreed that plaintiff have judgment against defendant in the amount of $3,455.90 as to the items set forth in Paragraph 10 b and Paragraph 10 c of the complaint, and that plaintiff have execution therefore.

366 2. It is further ordered, adjudged and decreed that plaintiff take nothing and no relief be granted as to plaintiff's other claims asserted against defendant in the complaint and they are hereby dismissed on the merits.

3. It is further ordered, adjudged and decreed that no costs be assessed against either party.

Entered: September 7, 1956.

/s/ J. S. Perry
Judge

367

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 54 C 1667) • •

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANT

Plaintiff files the following objections to defendant's findings of fact and conclusions of law:

2. Plaintiff objects to defendant's conclusions of law numbered 7, 8, 9, 10 and 11 in that said conclusions are contrary to law.

3. Plaintiff objects to defendant's conclusions of law numbered 7, 8 and 9 because such conclusions are broader than the facts from which such conclusions purport to have been drawn.

368 4. Plaintiff objects to defendant's conclusions of law numbered 11 in that it purports to be based in part on actions taken by the Federal Reserve Bank of Chicago and the Comptroller of the Currency, which actions could not be, and did not purport to be, binding upon the plaintiff in its interpretation and administration of the Federal Deposit Insurance Law.

Respectfully submitted,
/s/ John H. Bishop
/s/ G. J. Oppegard
Attorneys for Plaintiff,
Federal Deposit Insurance
Corporation

385

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff,
vs.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant.
No. 54 C 1667

NOTICE OF APPEAL
(Filed Oct. 4, 1956)

Notice is hereby given that Federal Deposit Insurance Corporation, plaintiff above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from paragraph 2 of the final judgment entered in this action on September 7, 1956, which paragraph reads as follows:

"It is further ordered, adjudged and decreed that plaintiff take nothing and no relief be granted as to plaintiff's other claims asserted against defendant in the complaint and they are hereby dismissed on the merits;"

The said "other claims" being set forth in paragraph 10 (a), (d), (e), (f) and (j) of the complaint and paragraphs 7, 8, 9, 10 and 11 of the Conclusions of Law on file in this cause.

/s/ W. M. Doherty
/s/ John H. Bishop
Attorneys for Appellant,
Federal Deposit
Insurance Corporation,
141 W. Jackson Blvd.
Chicago 4, Illinois.

386 Frank D. Mayer
Louis A. Kohn
Mayer, Friedlich, Spiess, Tierney, Brown & Platt,
Attorneys for Appellee,
Continental Illinois National Bank and Trust
Company of Chicago.
231 South LaSalle Street
Chicago, Illinois

387 United States of America }
Northern District of Illinois } ss.

(Caption—No. 54 C 1667)

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 4th day of October, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Mayer, Freidlich, Spiess, Tierney, Brown and Platt
231 South La Salle Street
Chicago 4, Illinois

(Seal)

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 4th day of October, 1956.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

388

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 54 C 1667)

NOTICE OF CROSS APPEAL

(Filed Oct 8 - 1956)

Notice Is Hereby Given that Continental Illinois National Bank And Trust Company Of Chicago, defendant above named, hereby cross-appeals to the United States Court of Appeals for the Seventh Circuit from Paragraph 1 of the final judgment entered herein on September 7, 1956, reading as follows:

"1. It is ordered, adjudged and decreed that plaintiff have judgment against defendant in the amount of $3,455.90 as to the items set forth in Paragraph 10 b and Paragraph 10 c of the complaint, and that
389 plaintiff have execution therefore."

/s/ Frank D. Mayer
Frank D. Mayer
/s/ Louis A. Kohn
Louis A. Kohn
Attorneys for defendant Continental Illinois National Bank and Trust Company of Chicago,
231 South LaSalle Street
Chicago 4, Illinois

Dated: October 6, 1956

390 United States of America }
Northern District of Illinois } ss.

• • (Caption—No. 54 C 1667) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 8th day of October, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Bishop, Burdett, Falasz and Doherty
Board of Trade Building
Chicago, Illinois

(Seal)

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 8th day of October, 1956.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

FEDERAL REGISTER
Volume 15 No. 221
Washington, Tuesday, November 14, 1950

• • •

[p. 7724]

FEDERAL DEPOSIT INSURANCE CORPORATION
[12 CFR, Parts 301-334]

Miscellaneous Amendments to Chapter
Notice of Proposed Rule Making

Notice is hereby given that adoption of the following rules and regulations is contemplated. All interested persons who desire to submit written data, views, or argu-

ments for consideration by the Board of Directors of the Federal Deposit Insurance Corporation in connection with the proposed rules shall send them to the Secretary, Federal Deposit Insurance Corporation, Washington 25, D. C., within 15 days after publication of this notice in the Federal Register.

Federal Deposit Insurance Corporation,

[Seal] E. F. Downey,
Secretary.

• • •

[p. 7728]

(d) Special purpose funds. Money received or held by the bank, or the credit given therefor to an account including a special or memorandum account, which money or credit is held for a special or specific purpose, regardless of whether the relationship thereby created is that of debtor-creditor, fiduciary, or any other relationship.

• • •

36. Sections 327.1 and 327.2 are amended to read as follows:

§ 327.1 Cash items—(a) Definition. The term "cash item," as used in section 7 of the Federal Deposit Insurance Act and in this part, means any instrument providing for the payment of money which the reporting bank has received in the regular course of business pursuant to an agreement under which the bank has given credit to a deposit account, and checks and bank drafts received and paid by it in the regular course of business: Provided, That the instrument, check or draft is in the process of collection and is payable on presentation: And, provided further, That the payor or drawee of the instrument, check or draft, is a bank or person other than the reporting bank. The term "reporting bank" as used in

this part means the bank filing the certified statement for assessment purposes.

(b) Cash items eligible for deduction. In computing the assessment base, only cash items, as defined in this section, may be deducted. Such cash items may be deducted without regard to whether withdrawal has been made against the credit given to deposit accounts therefor. No cash item shall be deducted except in accordance with the provisions of this part and unless such records are maintained as will readily permit verification of the correctness thereof.

§ 327.2. Period of deduction for uncollected cash items —(a) Choice of method. An insured bank may, at its option, use either of the two following methods in computing its deductible cash items, namely: (1) by multiplying by 2 the total of the cash items forwarded for collection on the assessment base days which were received on said days and the cash items held for clearings at the close of business on said days which were received on said days, or (2) by deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings at the close of business on said days plus uncollected cash items paid or credited on preceding days: Provided, The method selected must be followed for the entire assessment period. If the second alternative method is used, the maximum periods of deduction shall be as prescribed in the following paragraphs (b) and (c), and no cash item may be considered as uncollected for any period in excess of said maximum. No cash item shall be deducted after the bank has had advice that the item has been paid or dishonored.

(b) Cash items paid or credited to deposit accounts in bank or branch located in any Federal Reserve District. In the case of any insured bank or branch located

in any Federal Reserve district, cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligible for deduction for that day. Any cash item forwarded for collection on preceding days which remains uncollected as of the close of business on the assessment base day shall be eligible for deduction for the base day: Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time necessary to send the item in due course to the Federal Reserve bank of the Federal Reserve district or the branch of the subdistrict thereof in which the reporting bank is located, plus the time allowed for collection from the place where the item is payable, as shown on the current Time Schedule of such Federal Reserve bank or branch thereof.

(c) Cash items paid or credited to deposit accounts in bank or branch located outside of any Federal Reserve district. In the case of any insured bank or branch located outside any Federal Reserve district, cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligible for deduction for that day. Any cash item forwarded for collection on preceding days which remains uncollected at the close of business on the assessment base day shall be eligible for deduction for the base day, Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time from the date the cash item is paid or credited to a deposit account and the date of receipt (in the usual course of business) by the correspondent bank to which the item is forwarded for collection plus (1) the collection time allowed by the Federal Reserve time schedule for the district in which

the correspondent bank is located or (2) the actual collection time, where the collection time is not included in the Federal Reserve time schedule.

(d) Construction of section. This section is not to be construed as requiring any bank to clear items through any Federal Reserve bank or branch thereof.

* * *

FEDERAL REGISTER
Volume 15 No. 236
Washington, Wednesday, December 6, 1950

* * *

[p. 8628]

TITLE 12—BANKS AND BANKING

Chapter III—Federal Deposit Insurance Corporation

Revision of Chapter

Effective thirty days after publication in the Federal Register, Chapter III, Title 12, Code of Federal Regulations, is revised to read as set forth below. After consideration of all revelant matter presented on the proposed changes, published in the Federal Register of November 14, 1950 (15 F. R. 7724), the substance of such changes has been incorporated in this revision. Proposed § 327.1 (a), defining the term "cash item" has been modified with reference to banks with branches and to the payment of checks and drafts. Proposed § 328.4, relating to advertisements in non-English language, has been modified and changed to § 328.2 (e). Additional exemptions to the requirement of using the official advertising statement have been added as § 328.2 (c) (11)-(20). Proposed § 328.2 (c) (7) has been modified. As these changes enlarge the rights of insured banks, notice of them as proposed rules is found to be unnecessary.

Special purpose funds, defined in § 326.1 (d), include, among others and without limitation to those mentioned here, escrow funds, funds held as collateral security for an obligation due the bank or others, withheld taxes, funds held for distribution or for purchase of securities or currency, or funds held by the bank to meet its acceptances or letters of credit. The Corporation has consistently interpreted the term "deposit", as defined in the Federal Deposit Insurance Act since 1935, to include special purpose funds as defined in § 326.1 (d). These special purpose funds are also deposits by general usage. This clarification is made with the realization that some or all of the funds defined as special purpose funds in § 326.1 (d) may be within the term "deposit" as defined in the Federal Deposit Insurance Act since 1935.

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[p. 8638]

Part 326—Bank Obligations Prescribed as Deposits

Sec.

326.1 Deposits.

326.2 Money or its equivalent.

Authority: §§326.1 and 326.2 issued under sec. 9, Pub. Law 797, 81st Cong. Interpret or apply sec. 3, Pub. Law 797, 81st Cong.

§ 326.1. Deposits. The term "deposit" as used in section 3 (1) of the Federal Deposit Insurance Act, shall include the following obligations:

(a) Outstanding drafts, cashier's checks and other officer's checks. Outstanding drafts,[1] cashier's checks, and other officer's checks issued under any of the following circumstances:

(1) For money or its equivalent received by the issuing bank; or

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[1] Drafts drawn on foreign correspondents or foreign branches and payable only in foreign countries are not included in the term "deposit."

(2) For a charge against a deposit account in the issuing bank; or

(3) In settlement of checks, drafts, or other instruments forwarded to the issuing bank for collection.

(b) Certified checks. Checks drawn against a deposit account and certified by the drawee bank.

(c) Traveler's checks and letters of credit. Outstanding traveler's checks or letters of credit on which the bank is primarily liable issued under either of the following circumstances:

(1) For money or its equivalent received by the issuing bank; or

(2) For a charge against a deposit account in the issuing bank.

(d) Special purpose funds. Money received or held by the bank, or the credit given therefor to an account including a special or memorandum account, which money or credit is held for a special or specific purpose, regardless of whether the relationship thereby created is that of debtor-creditor, fiduciary, or any other relationship.

§326.2 Money or its equivalent. Under paragraphs (a) and (c) of § 326.1 drafts, cashier's checks and other officer's checks, traveler's checks and letters of credit must be regarded as issued for the equivalent of money when issued in exchange for checks or drafts or for promissory notes upon which the person procuring any of the enumerated instruments is primarily or secondarily liable.

Part 327—Assessments

Sec.

327.1 Classes of uncollected items eligible for deduction.
327.2 Periods of deduction for uncollected items.
327.3 Payment of assessments by banks whose insured status has terminated.
327.4 Time of payment.

Authority: §§327.1 to 327.4 issued under sec. 9, Pub. Law 797, 81st Cong. Interpret or apply secs. 7, 8, Pub. Law 797, 81st Cong.

§ 327.1 Cash items—(a) Definition. The term "cash item," as used in section 7 of the Federal Deposit Insurance Act and in this part, means any instrument providing for the payment of money which the reporting bank has received in the regular course of business pursuant to an agreement under which the bank has given credit to a deposit account, and checks and bank drafts received and paid by it in the regular course of business: Provided, That the instrument, check or draft is in the process of collection and is payable on presentation: And, provided, further, That the payor or drawee of the instrument, check or draft, is a bank or person other than the reporting bank or a branch office or main office of the reporting bank other than the office where the item is received. The term "reporting bank" as used in this part means the bank filing the certified statement for assessment purposes. For the purposes of this paragraph a check or bank draft is deemed paid by the reporting bank if the bank has given cash or other consideration therefor.

[p. 8639] (b) Cash items eligible for deduction. In computing the assessment base, only cash items, as defined in this section, may be deducted. Such cash items may be deducted without regard to whether withdrawal has been made against the credit given to deposit accounts therefor. No cash item shall be deducted except in accordance with the provisions of this part and unless such records are maintained as will readly permit verification of the correctness thereof.

§ 327.2 Period of deduction of uncollected cash items—(a) Choice of method. An insured bank may, at its option, use either of the two following methods in comput-

ing its deductible cash items, namely: (1) by multiplying by 2 the total of the cash items forwarded for collection on the assessment base days which were received on said days and the cash items held for clearings at the close of business on said days which were received on said days, or (2) by deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings at the close of business on said days plus uncollected cash items paid or credited on preceding days: Provided, The method selected must be followed for the entire assessment period. If the second alternative method is used, the maximum periods of deduction shall be as prescribed in the following paragraphs (b) and (c), and no cash item may be considered as uncollected for any period in excess of said maximum. No cash item shall be deducted after the bank has had advice that the item has been paid or dishonored.

(b) Cash items paid or credited to deposit accounts in bank or branch located in any Federal Reserve district. In the case of any insured bank or branch located in any Federal Reserve district, cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligibile for deduction for that day. Any cash item forwarded for collection on preceding days which remains uncollected as of the close of business on the assessment base day shall be eligible for deduction for the base day: Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time necessary to send the item in due course to the Federal Reserve bank of the Federal Reserve district or the branch of the subdistrict thereof in which the reporting bank is located, plus the time allowed for collection from the place where the item is payable, as shown on the current Time Schedule of such Federal Reserve bank or branch thereof.

(c) Cash items paid or credited to deposit accounts in bank or branch located outside of any Federal Reserve district. In the case of any insured bank or branch located outside any Federal Reserve District, cash items forwarded for collection and cash items held for clearings at the close of business on the base day shall be eligible for deduction for that day. Any cash item forwarded for collection on preceding days which remains uncollected at the close of business on the assessment base day shall be eligible for deduction for the base day; Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time from the date the cash item is paid or credited to a deposit account and the date of receipt (in the usual course of business) by the correspondent bank to which the item is forwarded for collection plus (1) the collection time allowed by the Federal Reserve time schedule for the district in which the correspondent bank is located or (2) the actual collection time, where the collection time is not included in the Federal Reserve time schedule.

(d) Construction of section. This section is not to be construed as requiring any bank to clear items through any Federal Reserve bank or branch thereof.

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FEDERAL REGISTER
Volume 19 No. 36
Washington, Saturday, February 20, 1954

[p. 1019]

FEDERAL DEPOSIT INSURANCE CORPORATION

[12 CFR Parts 302, 326, 327]

Amendment of Assessments and Other Provisions
Notice of Proposed Rule Making

Notice is hereby given that adoption of the following rules and regulations is contemplated. Prior to their

final adoption, however, consideration will be given to any data, views, or comments pertaining thereto which are submitted in writing to the Secretary, Federal Deposit Insurance Corporation, Washington 25, D.C. by any interested person within 30 days from the publication of this notice in the Federal Register.

The proposed regulations are as follows:

1. Part 327 is amended to read as follows:

Part 327—Assessments

Sec.

327.1 Definitions and periods of deduction for uncollected items.
327.2 Payment of assessments by banks whose insured status has terminated.
327.3 Time of payment.

Authority: §§ 327.1 to 327.3 issued under sec. 9, 64 Stat. 882; 12 U.S.C. 1819. Interpret or apply secs. 7, 8, 64 Stat. 876-881; 12 U.S.C. 1817, 1818.

§ 327.1 Definitions and periods of deduction for uncollected items. As used in section 7 (a) of the Federal Deposit Insurance Act and in this part:

(a) Base day; definition. The term "base day" shall be the period of time beginning with the time of the closing of the books of the bank on the last business day immediately preceding the base day to the time of the closing of the books of the bank on the base day according to the normal and day-by-day practice of the bank. Holidays and other nonbusiness days intervening between the preceding business day and the base day are a part of the base day.

(b) Cash item; definition. The term "cash item" means any instrument providing for the payment of money which the reporting bank has received in the regular course of business pursuant to an agreement under which

the bank has given credit to a deposit account or paid in the regular course of business: Provided, That the instrument is in the process of collection and is payable on presentation: Provided further, That the payer or drawee of the instrument is not the reporting bank or a branch or office thereof. The term reporting bank as used in this part means the bank filing the certified statement for assessment purposes. For the purpose of this paragraph a cash item shall be deemed paid by the reporting bank if the bank has given cash therefor or credit as a payment on a debt due to the bank: Provided, however, That an instrument received by a bank in payment of, or arising from, the sale or other disposition of any of its assets is not a cash item.

(c) Maintenance of assessment records. Each insured bank, as a condition to the right to make any deduction or exclusion in determining its assessment base, shall maintain such records as will readily permit verification of the correctness thereof.

(d) Cash items eligible for deduction. (1) In computing the assessment base only cash items, as defined in this section, may be deducted under either of the two alternative methods described in this part. Such cash items may be deducted without regard to whether withdrawal has been made against the credit given to deposit accounts therefor: Provided, That such cash items are credited and withdrawals are made in the normal course of business.

(2) No cash item shall be deducted after the bank has had advice that the item has been paid or dishonored and no deduction may be claimed for instruments received in payment for cash items previously paid or credited to deposit accounts and forwarded for collection nor for instruments received in payment of clearings.

(3) No deduction may be claimed for drafts transferring funds from one correspondent bank to another nor for drafts drawn and delivered or exchanged for the purpose of reducing the assessment base. No deduction may be made for a cash item drawn by an officer, director, stockholder, or affiliate of the reporting bank, or at their suggestion or direction, for the purpose of abnormally increasing the deposits on the base day, or for the purpose of obtaining abnormal deductions. The length of time such funds remain on deposit will be a factor in determining their purpose.

(4) No two reporting banks may deduct the same cash item under the (aa) method[1] for computing deductible cash items unless one of the banks normally, and in the regular course of business, is a collecting and check clearing agent for the other bank. Cash items reaching another bank or banks by special handling on the base day may not be deducted under the (aa) method by such other bank or banks but such other bank or banks may claim deduction therefor in the actual [p. 1020] amount if included in the reported deposit liabilities.

(e) Process of collection. (1) A cash item is deemed to be in the process of collection from the time it is either credited to a deposit account or paid by the reporting bank and until the reporting bank has received payment in the form of cash, an acceptable credit, or a draft or officer's check, or notice of dishonor, but such draft or officer's check is not a cash item for the purpose of claiming deductions: Provided, That an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time necessary to send the item in due

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[1] See sec. 7 (a), Federal Deposit Insurance Act, 12 U.S.C. 1817 (a); also paragraph (i) of this § 327.1.

course to the Federal Reserve Bank of the Federal Reserve district or a branch thereof in which the reporting bank is located, plus the time allowed for collection from the place where the item is payable, as shown on the current Time Schedule of such Federal Reserve Bank or branch thereof: Provided further, In the case of an insured bank or branch located outside of any Federal Reserve district, an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time from the date the cash item is paid or credited to a deposit account and the date of receipt (in the usual course of business) by the correspondent bank to which the item is forwarded for collection plus the collection time allowed by the Federal Reserve Time Schedule for the district in which the correspondent bank is located.

(2) A cash item drawn on a place not included in the Federal Reserve Time Schedule may be considered to be in the process of collection for the actual time required to collect it.

(3) This section is not to be construed as requiring any bank to clear items through any Federal Reserve Bank or branch thereof.

(f) Forwarded for collection. Cash items shall be deemed to have been forwarded for collection on the base day if they have been received and forwarded by the bank on the base day (that is, after the closing of the books on the preceding business day and prior to the closing of the books on the base day) and shall have been paid or credited to deposit accounts on that day including such items which in accordance with the normal procedures of the bank are still in its possession at the time of the closing of the books on the base day. When holidays and other nonbusiness days intervene between the previous business day and the base day the cash items transmitted

for collection on any such intervening nonbusiness day may not be treated as cash items forwarded for collection on the base day if collected or if the maximum period for deductions prescribed in paragraph (e) of this section shall have expired at the time of the closing of the books on the base day.

(g) Held for clearings. A cash item is considered to be held for clearings at the close of business on the assessment base day if the payer or drawee of the instrument is a bank or person, other than the reporting bank, located in the same city or is a member or associate member of the same clearing house as the reporting bank and the cash item has been received in the usual course of business on the base day and before the closing of the books on that day but after the normal time for effecting clearings with the other local banks or at the clearing house on the base day or, when the payer or drawee is a person other than a bank, after the time it is normally presented for collection in the usual course of business.

(h) Payable on presentation. The term "payable on presentation" means any instrument which the payer or drawee is required to forthwith and unconditionally pay when presented. The term includes such items as warrants directed to a public official to pay on demand the amount thereof, matured bonds, matured coupons, sight drafts, and "payable through" items. The term does not include such items payable on demand as promissory notes, or drafts payable on the arrival or inspection of certain goods, or other items which are not customarily cleared or collected by banks as cash items.

(i) Choice of method in computing deductible cash items. An insured bank may, at its option compute its deductible cash items by either of the two following methods, designated (aa) and (bb), namely:

(aa) Under this method a bank may deduct, multiplied by two, the total of the cash items forwarded for collection on the base day and cash items held for clearings at the close of business on said day, which are in the process of collection and which were received and recorded on the books of the bank on the base day, all in accordance with the normal and day-by-day procedure of the bank.

(bb) Under this method a bank may deduct the total of the cash items forwarded for collection on the base day and cash items held for clearings at the close of business on said day, which are in the process of collection and which were received and recorded on the books of the bank on the base day, plus the amount of the cash items paid or credited on the preceding days which remain uncollected on the assessment base day, all in accordance with the normal and day-by-day procedure of the bank. If the (bb) method is used, no cash item may be considered uncollected for any period in excess of that prescribed in paragraph (e) of this section.

(j) Option to claim deductions for uncollected items; change of method. The reporting bank may select either of the two alternative methods, (aa) or (bb), for claiming deductions for exchanges, provided this same method is used for both base days in the semiannual assessment period. After this selection is made and a certified statement filed, the bank may not thereafter file amendments for such period for the purpose of changing to the other alternate method. When a bank has elected not to claim any deductions for exchanges in its certified statement for any period, it may not thereafter file an amended certified statement claiming such deduction for said period.

(k) Direct sendings of uncollected items. For the purposes of this part a cash item received on a base day by

a correspondent bank or a Federal Reserve Bank or branch thereof is considered as being received by the reporting bank on the base day if, in the normal course of the bank's business, the cash item has been forwarded direct to such correspondent by a depositor of the reporting bank for credit to the depositor's account in the reporting bank and the reporting bank enters such credit to the account of the depositor on the base day. Deductions may be claimed by the reporting bank for only the cash items in such direct sendings which remain uncollected at the time of the closing of the books on the base day. No deduction may be taken for any such cash item which would have been collected if the item had been forwarded directly to the reporting bank instead of the correspondent, and all deductions claimed must be supported by proper records maintained by the reporting bank.

(l) Interbranch items. An item which is drawn against a deposit account maintained in the main office or a branch office of the reporting bank and which is received by an office other than the office where the deposit account is carried and which has been paid or credited to a deposit account but has not been charged against the deposit account on which it is drawn may not be claimed as a deduction for exchanges but only the actual amount thereof may be deducted from the deposit liabilities.

(m) Reciprocal bank balances. A reciprocal bank balance for the purpose of this part is where the reporting bank has a deposit balance due to another insured bank and such reporting bank has a deposit balance "due from" the same insured bank, disregarding for this purpose balances representing deposits of trust funds. The reporting bank must include in the total of its deposit liabilities for assessment purposes the total of its deposit liability to the said insured bank as shown on the

books of the reporting bank at the time of the closing of its books on the base day. It may deduct from such total deposit liabilities the amount of the deposit balance "due from" such insured bank but not in an amount in excess of the balance due to such insured bank. For the purpose of computing the reciprocal bank balance deduction the balances used must be subject to immediate withdrawal. This means that both the "due to" and "due from" balances in the reporting bank must be reduced to collected balances. Any outstanding unpaid draft credited to the "due from" account should be added to the balance to show the actual collected balance due from the other insured bank in computing this deduction.

(n) Trust funds deposited in other insured banks; deduction. The term "trust funds" means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent. The reporting bank shall include in its total deposit liabilities for assessment purposes all trust funds held by it in a fiduciary ca-
[p. 1021] pacity. It may deduct from such total deposit liabilities the portion of such trust funds which it has deposited in another insured bank only where (1) with respect to trust funds received by the fiduciary bank in its trust department, the fiduciary bank has deposited such funds directly from its trust department to the depositee bank; (2) with respect to trust funds received by other departments of the bank from sources other than the trust department, the fiduciary bank has deposited such funds directly from such department or from its trust department to the depositee bank; (3) the account is maintained in the depositee bank by the reporting bank as fiduciary and the account is appropriately entitled to show that the funds therein are trust funds; (4) the funds in such account are used exclusively for their trust purposes by the fiduciary

reporting bank; and (5) records are maintained which clearly show that the trust funds have been deposited in the manner stated above.

FEDERAL REGISTER
Volume 19, No. 60

Washington, Saturday, March 27, 1954.

[p. 1663]

TITLE 12—BANKS AND BANKING

Chapter III—Federal Deposit Insurance Corporation

Amendment of Assessment and Other Provisions

Effective March 30, 1954, the amendments of Parts 302, 326, and 327 of the rules and regulations of the Corporation which were published in the Federal Register of February 20, 1954 (19 F. R. 1019-1021) under notice of proposed rule making, are adopted, after consideration of all relevant matter presented by interested persons on the proposed amendments, with further amendments. The amended regulations as adopted are set forth below. Parts 326 and 327 are applicable to the assessment base days commencing March 31, 1954, and thereafter. Any changes made by these amendments of regulations are not retroactive.

Amendments of Parts 302-309, 328 and 333 as set forth below are adopted effective March 30, 1954, and as these changes are in the nature of a clarification and do not diminish the rights of insured banks, notice of them as proposed rules is found to be unnecessary.

The amendments of the regulations, as adopted, are as follows:

1. Part 327 is amended to read as follows:

PART 327—ASSESSMENTS

Sec.

327.1 Definitions and periods of deduction for uncollected items.
327.2 Payment of assessments by banks whose insured status has terminated.
327.3 Time of payment.

Authority: §§ 327.1 to 327.3 issued under sec. 9, 64 Stat. 882; 12 U. S. C. 1819. Interpret or apply secs. 7, 8, 64 Stat. 876-881; 12 U. S. C. 1817, 1818.

§ 327.1 Definitions and periods of deductions for uncollected items. As used in section 7 (a) of the Federal Deposit Insurance Act and in this part:

(a) Base day; definition. The term "base day" shall be the period of time beginning with the time of the closing of the books[1] of the bank on the last business day immediately preceding the assessment base day to the time of the closing of the books of the bank on the base day according to the normal practice of the bank. Holidays and other nonbusiness days intervening between the preceding business day and the base day are a part of the base day.

(b) Cash item; definition. The term "cash item" means any instrument providing for the payment of money which the reporting bank has received in the regular course of business and in exchange therefor has given credit to a deposit account or has issued an instrument evidencing or constituting a deposit as defined in such Act or in Part 326 of this chapter, or has paid in the regular course of business: Provided, That the instrument is in the process

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[1] The phrase "closing of the books" on a business day, frequently referred to as the "cutoff time," here means the time to which transactions are reflected on the books as part of the business of that day, even though such transactions may not actually be recorded until a later time.

of collection and is payable on presentation: Provided further, That the payer or drawee of the instrument is not the reporting bank or a branch or office thereof. The term reporting bank as used in this part means the bank filing the certified statement for assessment purposes. For the purpose of this paragraph a cash item shall be deemed paid by the reporting bank if the bank has given cash therefor or credit as a payment on a debt due to the bank, or has received it in payment for a Series "E" bond or other security (not an asset of the bank), or as a collection for public utility service, or in a similar transaction: Provided, however, That an instrument received by a bank in payment of, or arising from, the sale or other disposition of any of its assets is not a cash item.

(c) Maintenance of assessment records. Each insured bank, as a condition to the right to make any deduction or exclusion in determining its assessment base, shall maintain such records as will readily permit verification of the correctness thereof.

[p. 1664]

(d) Cash items eligible for deduction. (1) In computing the assessment base only cash items, as defined in this section, may be deducted under either of the two alternative methods described in this section. Such cash items may be deducted without regard to whether withdrawal has been made against the credit given to deposit accounts therefor: Provided, That such cash items are credited and withdrawals are made in the normal course of business.

(2) No deductions may be made or claimed:

(i) For cash items after the reporting bank has received payment or notice of dishonor thereof;

(ii) For instruments received in payment for cash items previously paid or credited to deposit accounts and forwarded for collection;

(iii) For instruments received in payment of clearings;

(iv) By the issuing or drawer bank for drafts transferring its own funds;

(v) For drafts drawn and delivered or exchanged for the purpose of reducing the assessment base;

(vi) For any cash item drawn by an officer, director, stockholder, or affiliate of the reporting bank, or any person or corporation at its, his, or their suggestion or direction for the purpose of abnormally increasing the deposits on the base day or for the purpose of obtaining abnormal deductions. The length of time such funds remain on deposit will be a factor in determining their purpose.

(3) No two reporting banks may deduct the same cash item under the (aa) method[2] for computing deductible cash items unless one of the banks normally, and in the regular course of business, is a collecting and check clearing agent for the other bank. Cash items reaching another bank or banks by special handling on the base day, other than in the normal and regular practice, may not be deducted under the (aa) method by such other bank or banks but such other bank or banks may claim deduction therefor in the actual amount if included in the reported deposit liabilities.

(e) Process of collection. (1) A cash item is deemed to be in the process of collection from the time it is either credited to a deposit account or paid by the reporting bank and until the reporting bank has received acceptable payment in the form of cash, credit, draft, or officer's check, or notice of dishonor, but such draft or officer's check so received is not a cash item for the purpose of claiming deductions: Provided, That an item shall not be

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[2] See sec. 7 (a), Federal Deposit Insurance Act, 12 U. S. C. 1817 (a); also paragraph (i) of this § 327.1.

considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time necessary to send the item in due course to the Federal Reserve Bank of the Federal Reserve district or a branch thereof in which the reporting bank is located, plus the time allowed for collection from the place where the item is payable, as shown on the current Time Schedule of such Federal Reserve Bank or branch thereof: Provided further, That in the case of an insured bank or branch located outside of any Federal Reserve district, an item shall not be considered as uncollected at the close of business on the base day if such item has been outstanding for a period in excess of the time from the date the cash item is paid or credited to a deposit account and the date of receipt (in the usual course of business) by the correspondent bank to which the item is forwarded for collection plus the collection time allowed by the Federal Reserve Time Schedule for the district in which the correspondent bank is located.

(2) A cash item drawn on a place not included in the Federal Reserve Time Schedule, or a cash item not collectible through a Federal Reserve Bank or branch thereof, may be considered to be in the process of collection for the actual time required to collect it.

(3) This section is not to be construed as requiring any bank to clear items through any Federal Reserve Bank or branch thereof.

(f) Forwarded for collection. A cash item shall be deemed to have been forwarded for collection on the base day if it has been received for collection on the base day and has been either forwarded for collection on that day or is in the process of forwarding in accordance with the normal procedure of the bank, even though the item may be in the possession of the bank at the time of the closing of the books on the base day. When holidays and other

nonbusiness days are a part of the base day the cash items transmitted for collection on any such nonbusiness day may not be treated as cash items forwarded for collection on the base day if the items are collected at the time of the closing of the books on the base day, or if the maximum period for deductions prescribed in paragraph (e) of this section shall have expired at the time of the closing of the books on that day.

(g) Held for clearings. A cash item is considered to be held for clearings at the close of business on the base day if:

(1) It has been received in the usual course of business on the base day before the closing of the books on that day;

(2) It is held for clearance or presentment at the time of the said closing in conformity with the normal practice of the reporting bank;

(3) The payer or drawee of the instrument is a bank or person, other than the reporting bank, located in the same city or local clearing area or is a member of or affiliated with the same clearing house as the reporting bank or regularly clears through such clearing house or a member or an affiliate thereof.

(h) Payable on presentation. An item is deemed to be "payable on presentation" when the payer or drawee is required to pay it forthwith upon presentation. The reference includes such items as warrants directed to a public official to pay on demand the amount thereof, matured bonds or bonds presented for redemption, matured coupons, "payable through" items, and sight drafts with or without bills of lading, securities, or other similar documents attached. It does not include items payable upon arrival or inspection of certain goods nor other items which are not customarily cleared or collected by the reporting bank as cash items.

(i) Choice of method in computing deductible cash items. An insured bank may, at its option, compute its deductible cash items by either of the two following methods, designated (aa) and (bb), namely:

(aa) Under this method a bank may deduct twice the amount of the total of the cash items forwarded for collection on the base day and cash items held for clearings at the close of business on said day which are in the process of collection and which were received and reflected on the books as part of the business of the base day, all in accordance with the normal procedure of the bank.

(bb) Under this method a bank may deduct the total of the cash items forwarded for collection on the base day and cash items held for clearings at the close of business on said day which are in the process of collection and which were received and reflected on the books as part of the business of the base day, plus the amount of the cash items paid or credited on the preceding days which are in the process of collection and which remain uncollected on the assessment base day, all in accordance with the normal procedure of the bank. If the (bb) method is used, no cash item may be considered uncollected for any period in excess of that perscribed in paragraph (e) of this section.

(j) Option to claim deductions for uncollected items; change of method. The reporting bank may select either of the two alternate methods, (aa) or (bb), for claiming deductions for cash items, provided this same method is used for both base days in the semiannual assessment period. After this selection is made and a certified statement filed, the bank may, within two years from the date on which such certified statement was required to be filed, file an amendment of such certified statement for the purpose of changing to the other alternate method. When a bank has elected not to claim any deductions for cash

items in a certified statement, it may, within two years from the date on which such certified statement was required to be filed, file an amendment of such certified statement claiming deductions for cash items.

(k) Direct sendings of uncollected items. For the purposes of this part a cash item received on a base day by a correspondent bank or a Federal Reserve Bank or branch thereof is considered as being received by the reporting bank on the base day if, in the normal course of the bank's business, the cash item has been forwarded direct to such correspondent or Federal Reserve Bank or branch thereof by a depositor of the reporting bank for credit to the depositor's account in the reporting bank and the reporting bank enters such credit to the account of the depositor on the base day. Deductions may be claimed by the reporting bank for only the cash items in such direct sendings which remain uncollected at the time of the closing of the books on the base day. No deduction may be taken for any such cash item which would have been collected if the item had been forwarded directly to the reporting bank instead of to the correspond-
[p. 1665] ent, and all deductions claimed must be supported by proper records maintained by the reporting bank.

(l) Interbranch items. An item which is drawn against a deposit account maintained in the main office or a branch office of the reporting bank and which is received by an office of the reporting bank other than the office where the deposit account is carried and which has been paid or credited to a deposit account is not a cash item eligible for deduction. If the item is not reflected on the books of the bank on the base day as a charge against deposit liabilities, it may be subtracted therefrom in its actual amount.

(m) Reciprocal bank balances. A reciprocal bank balance for the purpose of this part is where the reporting bank has a deposit balance due to another insured bank and such reporting bank has a deposit balance due from the same insured bank, disregarding for this purpose balances representing deposits of trust funds. The reporting bank must include in the total of its deposit liabilities for assessment purposes the total of its deposit liability to the said other insured bank as shown on the books of the reporting bank at the time of the closing of its books on the base day. It may deduct from such total deposit liabilities the amount of the deposit balance due from such other insured bank but not in an amount in excess of the balance due to such insured bank. For the purpose of computing the reciprocal bank balance deduction the balances used must be subject to immediate withdrawal. This means that items in the process of collection must be excluded from the computation of both the "due to" and "due from" balances as shown on the books of the reporting bank. Any outstanding unpaid draft credited to the "due from" account may be added back to the book balance to show the actual collected balance due from the other insured bank in computing this deduction.

(n) Trust funds deposited in other insured banks; deduction. The term "trust funds" means funds held by an insured bank in a fiduciary capacity, whether held in its trust department or deposited in any other department or in another bank, and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent. The reporting bank shall include in its total deposit liabilities for assessment purposes all trust funds so held by it in a fiduciary capacity. It may, however, deduct from such reported total deposit liabilities the following portion of such trust funds so held:

(1) Trust funds received by the reporting bank in its trust department which the reporting bank has deposited directly from its trust department to a depositary insured bank;

(2) Trust funds received by other departments of the reporting bank from sources other than the trust department which funds the reporting bank has deposited directly from such department or from its trust department to the depositary insured bank;

(3) Trust funds deposited directly to the account of the reporting bank in a depositary insured bank by a person or persons other than the reporting bank;

(4) Trust funds originating from a pre-existing deposit account in another insured bank to which the reporting bank has become entitled in its fiduciary capacity: Provided, That in each of the foregoing instances:

(i) The account is maintained in the depositary insured bank by the reporting bank as fiduciary and the account is appropriately entitled to show that the funds therein are trust funds;

(ii) The funds in such account are used exclusively for their trust purposes by the reporting bank; and

(iii) Records are kept which clearly show that the trust funds have been deposited and maintained in the manner above stated.

* * *

PART 326—BANK OBLIGATIONS PRESCRIBED AS DEPOSITS

Sec.

326.1 Deposits.

326.2 Money or its equivalent.

Authority: §§ 326.1 and 326.2 issued under sec. 9, 64 Stat. 882; 12 U. S. C. 1819. Interpret or apply sec. 3, 64 Stat. 874; 12 U. S. C. 1813.

§ 326.1 Deposits. The term "deposit" as used in section 3 (1) of the Federal Deposit Insurance Act, shall include the following obligations.

(a) Outstanding drafts, cashiers' checks and other officers' checks. Outstanding drafts,[1] cashiers' checks, and other officers' checks issued under any of the following circumstances:

(1) For money or its equivalent received by the issuing bank; or

(2) For a charge against a deposit account in the issuing bank; or

(3) In settlement of checks, drafts, or other instruments forwarded to the issuing bank for collection.

(b) Certified checks. Checks drawn against a deposit account and certified by the drawee bank.

(c) Letters of credit and traveler's checks.[2] Outstanding letters of credit or traveler's checks on which the bank is primarily liable issued under either of the following circumstances:

(1) For money or its equivalent received by the issuing bank; or

(2) For a charge against a deposit account in the issuing bank.

(d) Special purpose funds. Money received or held by the bank, or the credit given therefor to an account including a special or memorandum account, which money

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[1] Drafts drawn on foreign correspondents or foreign branches and payable only in foreign countries are not included in the term "deposit".

[2] The change in the wording of this paragraph is a clarification of the consistent interpretation by the Corporation of the term "letters of credit" to include all letters of credit issued under the circumstances stated in this paragraph.

or credit is held for a special or specific purpose, regardless of whether the relationship thereby created is that of debtor-creditor, fiduciary, or any other relationship.[3]

369

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 54 C 1667) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY PLAINTIFF.

(filed September 7, 1956)

FINDINGS OF FACT.

Plaintiff, Federal Deposit Insurance Corporation, requests the Court to make the following findings of fact:

1. Federal Deposit Insurance Corporation is the administrative agency charged with the administration of the acts of Congress passed August 23, 1935 and September 21, 1950 and the regulations promulgated thereunder which relate to the collection of assessments from banks whose deposits are insured by Federal Deposit Insurance Corporation. From the date of the enactment of the Federal Deposit Insurance Act on August 23, 1935, down to the date of the amendment of said statute September 21,

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[3] Special purpose funds, defined in § 326.1 (d), include, among others and without limitation to those mentioned here, escrow funds, funds held as collateral security for an obligation due the bank or others, withheld taxes, funds held for distribution or for purchase of securities or currency, or funds held by the bank to meet its acceptance or letters of credit. The Corporation has consistently interpreted the term "deposit", as defined in the Federal Deposit Insurance Act since 1935, to include special purpose funds as defined in § 326.1 (d). These special purpose funds are also deposits by general usage. This clarification is made with the realization that some or all of the funds defined as special purpose funds in §326.1 (d) may be within the term "deposit" as defined in the Federal Deposit Insurance Act since 1935.

1950, the Federal Deposit Insurance Corporation consistently interpreted the aforesaid statute and regulations promulgated thereunder to require insured banks to in-
370 clude in the assessment base the balances due to other banks without any deduction therefrom of any amount of the balances due from such banks, which interpretation was acquiesced in and complied with during said period of time by all insured banks other than defendant and one or two banks which paid assessments on such gross reciprocal bank balances under protest.

2. Defendant maintained reciprocal bank accounts with 26 banks in the United States. Defendant treated the deposit accounts maintained with it by banks with which reciprocal deposit accounts existed the same as deposit accounts of other customers. Such accounts were kept in ledgers, the same as the accounts of individual customers. Deposits were made and funds withdrawn from such accounts in the identical manner that deposits were made and funds withdrawn from individual accounts. Monthly, semi-monthly or at other intervals, statements were forwarded by defendant to its reciprocal bank, such statements showing the total deposit balance in the account without any offset for balances due from the reciprocal bank. And the reciprocal bank followed the same practice with reference to the account which defendant kept with it. After August 2, 1937, defendant excluded reciprocal deposits from the reported deposits on its certified statements, and did not show them as deductions from total deposits.

3. From the date of the enactment of the amendment on September 21, 1950 down to the promulgation of the regulations of March 24, 1954, Federal Deposit Insurance Corporation consistently interpreted the aforesaid statute and the regulations promulgated thereunder to require

cash items to be eligible as deductions from total deposit liabilities where claimed under the (aa) method provided for in § 7(a) of the 1950 Statute, to be received and forwarded for collection on the calendar assessment 371 base day.

4. Under the statute enacted August 23, 1935, the deductions which defendant took for uncollected cash items were 7.24% of its deposits. The deductions which it took for uncollected cash items under the statute enacted September 21, 1950 were 12.43% of its deposits or an increase of 5.19% of deposits in such deductions after the 1950 Statute became effective.

5. At the time of the adoption of the 1950 regulation relating to deduction of cash items, notice of rule making was published in 15 Federal Register, pages 7724-7728. The actual adoption of the 1950 regulation relating to deduction of cash items was published in 15 Federal Register, pages 8628-8644. At the time of the adoption of the amended regulation of March 24, 1954, notice of rule making was published in 19 Federal Register, pages 1019-1021. The adoption of the 1954 regulation was published in 19 Federal Register, pages 1663-1667.

6. The contract reserve account was set up on the books of defendant pursuant to instructions from the customer to defendant "that you (defendant) will deposit in and credit to us (the customer) in an account to be set up on your books, (which account is hereinafter referred to as the 'contract reserve') a sum equal to ten per cent (10%) of the amount then owing by the Buyer under such contract". The amount so set up was held as security for the obligation of the customer to defendant.

372 CONCLUSIONS OF LAW.

1. Defendant, in computing its assessment base for the period July 1, 1948 through June 30, 1950 was

required to include in its assessment base balances due to other banks without any deduction therefrom of any amount of the balances due from such banks with which such reciprocal deposit accounts were maintained.

2. Defendant, in computing its assessment base for the period July 1, 1948 through June 30, 1950, was not entitled to exclude from its total deposit liabilities, reserve balances arising from purchases by defendant of evidences of indebtedness from its customers selling retail merchandise on credit; which reserve balances were deposited in and credited by defendant to an account of the customer set up on defendant's books.

3. Defendant, in computing its assessment base from July 1, 1948 through June 30, 1953, was not entitled to exclude from its total deposit liabilities, amounts deducted from salaries due employees of defendant which were held by defendant for the following purposes:

(a) Payment of federal income taxes on employees' salaries;

(b) Payment of employees' federal social security taxes;

(c) Payment of employees' contributions to group life insurance premiums, and

(d) Purchase of government securities for employees.

4. Defendant, in computing its assessment for the 373 base days of December 31, 1951, March 31, 1952 and June 30, 1952, each of which was a Monday base day, was not entitled to take deductions for cash items drawn on out-of-town drawees, which were received by defendant on the preceding Friday evening after the closing of its books, or on Saturday, or on Sunday and which were processed and dispatched for collection prior to said Monday base day.

5. Defendant, in computing its assessment for the base days of December 31, 1951, March 31, 1952 and June 30, 1952, each of which was a Monday base day, was not entitled to take deductions for cash items drawn on out-of-town drawees, which were received on Friday evening after the closing of the books, or on Saturday, or on Sunday, but which were not fully processed until the following base days of Monday on which base days the processing was completed and the items dispatched for collection.

6. Defendant, in computing its assessment for eight base days including the three Monday base days of December 31, 1951, March 31, 1952 and June 30, 1952, was not entitled to take deductions with respect to cash items drawn on out-of-town drawees which were received by defendant on said base days, processing of which had commenced but which were not completely processed and were not dispatched for collection until the day following said base days.

7. Defendant, in computing its assessment base for the period of July 1, 1950 through June 30, 1953, was not entitled to deduct as cash items Series "E" Govern-
374 ment bonds for which it had not given credit to customers' deposit accounts but had cashed on the base days and which defendant held for collection at the close of business on said base days.

Respectfully submitted,

Federal Deposit Insurance Corporation
By /s/ John H. Bishop
/s/ G. J. Oppegard
Attorneys

Office - Supreme Court, U.S.
FILED
SEP 13 1957
JOHN T. FEY, Clerk

No. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented by this Petition	2
Statutes Involved	3
Statement	4
(a) Reciprocal bank deposits	5
(b) Double deduction of uncollected cash items	7
(c) Dealer reserves	9
Reasons for Granting the Writ	10
I. The deduction of reciprocal bank balances involves important questions of federal law, either not yet settled by this Court, or decided contrary to applicable decisions of this Court	11
(a) the ruling that reciprocal deposits are not received in the "usual course of business" merits review by this Court	11
(b) the treatment of FDIC as an agency of the Federal Reserve System merits review by this Court	13
(c) the Court of Appeals disregarded applicable decisions of this Court on the effect of Congressional committee reports	16

PAGE

II. The double deduction for certain uncollected cash items should be reviewed 19

(a) the Court's restriction on FDIC's power to make regulations should be reviewed 20

(b) this Court should review the holding that FDIC's 1954 regulation was retroactive 23

III. The exclusion of dealer reserves from deposits should be reviewed 27

Conclusion 31

Appendix I—Statutes Involved 32

Appendix II—Opinion of Court of Appeals 37

Judgment of Court of Appeals 55

CASES CITED

Addison v. Holly Hill Fruit Products Co., 322 U. S. 607, 640-41 (1944) 26

American Nat. Bank v. Service Life Ins. Co., 120 F. 2d 579, 581 (7th Cir., 1941) 23

Constitution Indemnity Co. v. Shytles, 47 F. 2d 441 (5th Cir., 1931) 11, 12

Crane v. Commissioner, 331 U. S. 1, 6 (1947) 23

Davis v. McNair, 48 F. 2d 494, 496 (5th Cir., 1931) .. 28

D'Oench Duhme & Co., Inc. v. Federal Deposit Ins. Corp., 315 U. S. 447, 456 (1942) 10

PAGE

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 474 (1921) 18

Fawcus Machine Co. v. United States, 282 U. S. 375 (1931) 22

Federal Deposit Ins. Corp. v. Irving Trust Co., 137 F. Supp. 145 (S.D.N.Y. 1955) 13, 18, 29

Fidelity Bank and Trust Co. v. Eli-Walker Dry Goods Co., 77 S. W. (2d) 480, 483 (Mo. 1934) .. 30

Fuetl, In re, 247 Fed. 829, 832 (D. Conn. 1917) 17

Helvering v. Edison Bros. Stores, Inc., 133 F. 2d 575, 579 (8th Cir., 1943) 16

Helvering v. Wilshire Oil Co., 308 U. S. 90, 100 (1939) 26

Industrial Bank of St. Louis v. Federal Deposit Ins. Corp., 93 F. Supp. 916, 918 (E. D. Mo. 1954) .. 29

Interstate Transit Lines, Inc. v. Commissioner, 319 U. S. 590, 593 (1942) 16

Kansas City Southern Ry. Co. v. Commissioner, 52 F. 2d 372, 378 (8th Cir., 1931) 16

Kirkpatrick v. King, 228 Ind. 236, 91 N. E. 2d 785, 789 (1950) 23

Knight v. Mantel, 135 F. 2d 514, 517 (8th Cir. 1943).. 22

Lesavoy Foundation v. Commissioner, 238 F. 2d 589, 593—94 (3d Cir., 1956) 26

Lucas v. American Code Co., Inc., 280 U. S. 445. 449 (1930) 22

Manhattan General Equipment Co. v. Commissioner, 297 U. S. 129, 135 (1936) 24, 25

PAGE

Maryland Casualty Co. v. United States, 251 U. S. 342, 349 (1920) 22

McLaren v. Fleischer, 256 U. S. 477, 481 (1921) 22

Miller v. United States, 294 U. S. 435, 439 (1935) 25

National Labor Rel. Bd. v. Lion Oil Co., 352 U. S. 282, 292 (1957) 18

New York County Bank v. Massey, 192 U. S. 138, 145 (1902) 16

Old Colony R. Co. v. Commissioner, 284 U. S. 552, 562 (1932) 16

Rock Finance Co. v. Central National Bank, 339 Ill. App. 319, 89 N. E. 2d 828, 832 (1950) 23

United States v. American Trucking Associations, Inc., 310 U. S. 534 (1940) 18

United States v. Bergh, 352 U. S. 40, 46-47 (1956) .. 22

United States v. McClure, 305 U. S. 472, 477-78 (1939) 17

Statutes Cited

12 U.S.C. § 161 14

§ 264 .....3, 4, 7, 13, 14, 27

§§ 1811-31 4

§ 1812 14

§§ 1813, 1817, 1819, Tenth 3, 4, 21, 27

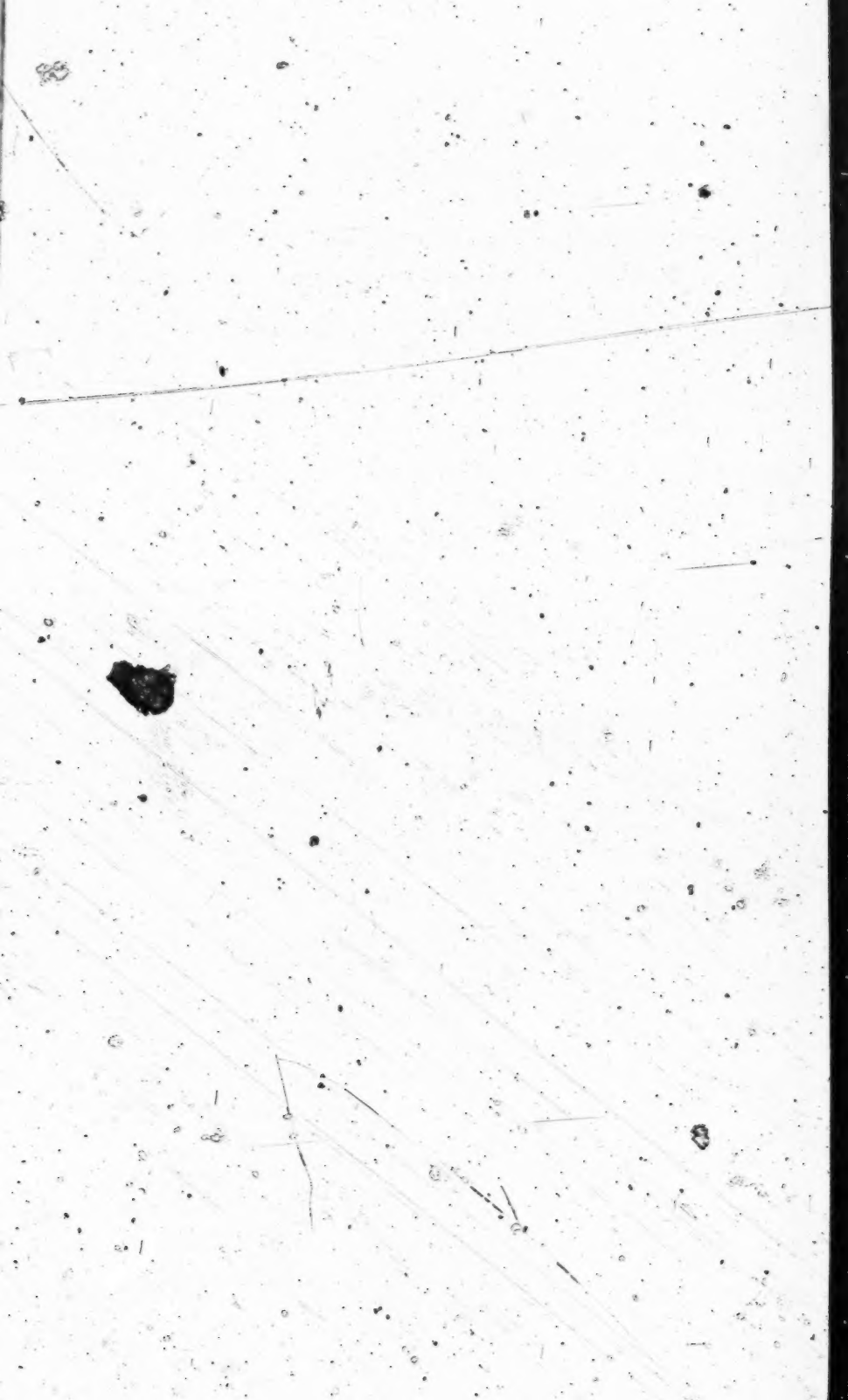
§ 1815 13

§ 1817(a) 4, 7, 17, 21, 30

§ 1819, Fourth 4

MISCELLANEOUS

	PAGE
Banking and Monetary Statistics, 194[illegible] ed., p. 70	14
1954, p. 139	27
F.D.I.C. Ann. Rep., 1951, p. 59	11
1942, pp. 68-69	13, 16
Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 413-15 (1941)	26
Sutherland, Statutory Construction, Sec. 5005 (3d Ed. 1943)	18
Von Baur, Federal Administrative Law, Sec. 493 (1942)	26



IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,

Petitioner,

against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Federal Deposit Insurance Corporation (herein termed "F.D.I.C.") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 25, 1957, which affirmed in part and reversed in part a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in an action brought by F.D.I.C. to recover assessments of Federal deposit insurance for the periods from July 1, 1948 through June 30, 1953.

Opinions Below

The memorandum opinion of the District Court is unreported and is printed in the Joint Appendix on which the case was heard in the Court of Appeals (J. A. 163-64). The opinion of the Court of Appeals is reported in 245 F. 2d 567, and printed in Appendix II to this petition. No petition for rehearing was filed.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented by This Petition

1. In computing assessable deposits, was the defendant bank entitled to deduct from the deposits of other banks the balances in deposit accounts (reciprocal accounts) which it maintains with those same banks?

2. In computing the statutory deduction for uncollected cash items included in deposits on the assessment base days, was the defendant bank entitled to deduct from deposits twice the amount of items not received and forwarded on the assessment base days?

3. Did amounts credited on defendant's books to the "contract reserve account" of sellers of commercial paper constitute assessable deposits?

The adverse decisions on these questions create important problems in the administration of the Federal Deposit Insurance Act, and affect the insurance fund which secures the depositors of insured banks. Their importance rests not only on the specific assessments which have been invalidated, but on the further consequences which will result from the underlying doctrines asserted by the Court below:

> *that a type of deposits (reciprocal deposits) present in over 300 insured banks, in a volume of approximately $670,000,000 in 1950, are not deposits received in the "usual course of business";*
>
> *that a regulation defining the conditions under which uncollected cash items may be deducted from the assessment base was beyond the powers of F.D.I.C.;*

that F.D.I.C. is an agency of the Federal Reserve System, and required to conform to rulings of the Federal Reserve Bank;

that amended regulations which were expressly stated to apply only from their effective date should nevertheless be applied retroactively to earlier assessment periods, giving rise to refund claims that may amount to millions of dollars; and

that accounts arising from the commercial business of a bank are nevertheless not "commercial" accounts and not deposits.

The Court of Appeals also departed from accepted standards of statutory interpretation, in holding that an amendatory statute should be applied to a period before its enactment, in spite of express statements by the two Congressional Committees reporting on it that it represented a *change* in the existing law.

The F.D.I.C. is faced with a dilemma in administering its nationwide system of insurance. Unless it treats what it considers an improper decision in this case as applicable to all banks, and grants millions of dollars in refund claims, it may have to contest similar cases in other circuits until an express conflict arises, leaving the law in confusion in the meantime.

Statutes Involved

The statutory provisions involved are subdivisions (c)(12)(13) and (h)(1) of the 1935 Federal Deposit Insurance Act, 12 U.S.C. § 264, and portions of §§§ 3, 7 and 9 of the 1950 Federal Deposit Insurance Act, 12 U.S.C. § 1813(l), (m) and (p), § 1817(a), § 1819, Tenth. They are printed in Appendix I to this petition *infra*, pp. 32-36.

Statement

F.D.I.C. is a corporation created by Federal statute in 1933,* to insure bank deposits. Defendant, Continental Illinois National Bank and Trust Company of Chicago (herein termed "Continental"), is a national banking corporation, a member of F.D.I.C. and insured by it.

Federal jurisdiction of the case exists by virtue of specific provision of statute, giving the Federal courts jurisdiction of actions in which F.D.I.C. is a party (12 U.S.C. § 1819, Fourth).

F.D.I.C. is financed by assessments on total deposits of insured banks. It receives no appropriations from Congress. Insured deposits differ from the total deposits on which assessments are based, in that insured deposits are restricted to a maximum of $10,000 for each depositor, *after deducting offsets,*** while assessments are computed on total deposit liabilities *without deduction for indebtedness of depositors* and without regard to the amount of a bank's insured deposits.***

Assessments are computed at the rate of 1/12th of 1% per annum on the average liability for deposits as defined in the Act (12 U.S.C. § 1817(a)). Under the 1935 Act it was necessary for insured banks, in their semi-annual statements to F.D.I.C., to average the total deposits for each calendar day of the period (12 U.S.C. § 264(h)(i)). Under the 1950 Act, assessments are now computed on the

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* The temporary statute enacted in 1933, as Section 12B of the Federal Reserve Act, was followed by a permanent statute in 1935 (12 U.S.C. § 264). This section was withdrawn from the Federal Reserve Act, constituted as a separate Federal Deposit Insurance Act and in turn amended in 1950 (12 U.S.C. §§ 1811-31).

** 12 U.S.C. § 264(c)(13), 1935 Act; 12 U.S.C. § 1813(m), 1950 Act.

*** 12 U.S.C. § 264(h)(1), 1935 Act; 12 U.S.C. § 1817 (a), 1950 Act.

average deposit liability on two specific days in each six-month period (12 U.S.C. § 1817(a)).

Three classes of deposits, or claimed deductions from deposits, are at issue on this petition, to wit:

(a) Reciprocal bank balances, involving instances where Continental holds a deposit of another bank and is itself a depositor of that bank;

(b) Uncollected cash items, involving checks and drafts on out-of-town banks, which Continental credited to deposit accounts but which were still in process of collection; and

(c) Dealer reserves, representing sums withheld on installment sales contracts purchased by Continental, and retained as security in an account in the customer's name, pending collection of the paper.*

The District Court, after trial on a stipulation and supplemental testimony, held that Continental was entitled to deduct items (a) and (b) from its assessment base, but that item (c) was assessable as a deposit. The Court of Appeals, on cross-appeals, affirmed the District Court's holding on items (a) and (b), but reversed as to item (c) and held that it was not a deposit.

(a) Reciprocal bank deposits.

Reciprocal accounts exist where two banks maintain deposit accounts with each other. Continental maintained such accounts with twenty-six other banks in nine principal cities throughout the country (J. A. 13). Reciprocal accounts exist in 300 or 400 of the larger banks (J. A. 108).

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* A fourth item, concerning payroll withholdings, was decided in favor of F.D.I.C. by the Court of Appeals, and is not involved in this petition.

F.D.I.C. always insisted under the 1935 Act that assessments be computed on the gross amount of deposits, without deduction for accounts which the reciprocal bank may maintain with the reporting bank (J. A. 69), as the statute expressly prohibited any deduction for indebtedness of depositors.

Continental itself treated reciprocal accounts at their gross amount for most purposes. Their ledger cards were kept intermingled with the accounts of other (non-bank) depositors (J. A. 95). Deposits were made and funds withdrawn by check or advice, in the same manner as deposits and withdrawals from individual or other corporate accounts (Pl. Ex. 7-11; J. A. 155-59). The reciprocal banks followed the same practice on accounts which Continental kept with them (J. A. 95-100).

A typical monthly statement which Continental issued to a Pittsburgh bank showed a balance on deposit with Continental on September 30, 1952, of $2,312,596.12 (Pl. Ex. 9; J. A. 157). No offset was shown on this statement, although Continental on the same date had a deposit of $1,099,146.38 with the Pittsburgh bank, as shown by the monthly statement the latter furnished Continental (Pl. Ex. 10; J. A. 158).

Continental nevertheless deducted deposits by reciprocal banks from its gross deposits, in making its initial semi-annual statements under the Federal Deposit Insurance Act (Pl. Ex. 4; J. A. 147). In 1937, F.D.I.C. notified Continental that this practice was improper, and asked it to file amended certified statements, eliminating such deductions (J. A. 147). Continental thereupon forwarded an additional check and filed amended statements which it described as "in compliance with your letter" (Pl. Ex. 5; J. A. 148). In fact, however, Continental had then omitted all but a small portion of its reciprocal accounts from its total deposits. F.D.I.C. did not discover this fact until a field audit, which was followed by the present suit, covering the periods not already barred by statute of limitations.

When suit was brought, Continental asserted that its practice in deducting balances deposited with reciprocal banks was justified by instructions issued in 1942 by the Comptroller of the Currency with respect to reports of condition of national banks (Def. Ex. 1; J. A. 161), and by the Federal Reserve Bank with respect to reports of member banks for computation of reserves (Def. Ex. 2; J. A. 162). Continental also relied on a retrospective interpretation of a 1950 amendment to the Federal Deposit Insurance Act, discussed below (p. 16, *infra*).

(b) Double deduction of uncollected cash items.

The Federal Deposit Insurance Act has always permitted banks to deduct from their deposits for assessment purposes the amount of their uncollected cash items, commonly called "float". Float consists primarily of checks and drafts on out-of-town banks, deposited to customers' accounts.

Under the 1935 Act, a reporting bank was allowed to deduct from its daily deposit liabilities all uncollected cash items included in such deposits (12 U.S.C. § 264(h)(1), p. 33, *infra*).

Under the 1950 Act, a reporting bank was offered two alternatives, designated as methods (aa) and (bb) (12 U.S.C. § 1817(a)(1)(iii), pp. 34-35, *infra*). Method (bb) was substantially the same as the deduction under the 1935 Act. Method (aa), which Continental used, permitted deducting *twice* the total of cash items "forwarded for collection on the assessment base days • • • which are in the process of collection and which the bank has • • • credited to deposit accounts" (pp. 34-35, *infra*).

Like the change from an average of each day's deposits to an average of only two base days in each six-month period, this alternative method was intended to simplify the banks' work. The double deduction for items forwarded on

the base day was intended to arrive at approximately the same result as the (bb) method, on the assumption that the average time necessary for the collection of such items was approximately two days (J. A. 78-79).* Therefore, deducting twice the amount of cash items forwarded on the base day should give approximately the same result as deduction of all items remaining uncollected on the base day.

In order to expedite collection of "float", Continental kept employees after public business hours on week-day evenings, and also on Saturdays and Sundays. These employees performed the various steps necessary for processing and dispatching for collection cash items drawn on out-of-town drawees and received after the closing of the bank's doors (J. A. 16-17). This practice raised issues which are important especially in the cases where base days fell on a Monday, for Continental entered under the Monday date items which had been forwarded for collection on Friday, Saturday and Sunday, and claimed a deduction *multiplied by two* for all such items (J. A. 17).

Had Continental used the (bb) method, it could have deducted all such items which were not actually collected on the base day; but F.D.I.C.'s regulations under the (aa) method provided that cash items could qualify for *double deduction* only if they were received and forwarded on the base day (J. A. 182-83).

The Court of Appeals held the F.D.I.C. regulations to be inconsistent with the statute insofar as they required items to be *received* on the base day, as well as forwarded on that day (p. 46, *infra*). The reasons for this requirement will be discussed below (pp. 20-21).

In respect of items which were neither received nor forwarded on the base day, the Court of Appeals supported

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* The Time Schedule of the Federal Reserve Bank of Chicago lists a maximum of three days' deferment of availability for collection of items drawn on the most distant point in the United States (Pl. Ex. 6; J. A. 151).

the double deduction by Continental on the ground that F.D.I.C. amended its regulations in 1954 to change the definition of base day, and permit deduction under the (aa) method of items forwarded after the close of business on the preceding business day. The 1954 amendments to the regulations were made after conference between F.D.I.C. representatives and a committee of the American Bankers Association; the Committee was told that the amendments would not be retroactive (J. A. 85-86), and the publication in the Federal Register described them as not retroactive (19 F. R. 1663-J. A. 193). The Court of Appeals asserted that, if F.D.I.C. had authority to make such an interpretation after 1954, the Court had authority to impose the same interpretation before 1954 (p. 48, *infra*).

(c) Dealer reserves.

Continental excluded from its deposits amounts set up in a "contract reserve account" in connection with the financing of commercial paper. Such exclusion has been sustained by the Court below, although the District Court had held these to be deposits and assessable.

Continental purchased installment sales contracts from a customer, without recourse, under a written agreement which provided that Continental should remit to the customer 90% of the face amount (less discount) and credit the remaining 10% to an account on Continental's books designated as the customer's "Contract Reserve" (Ex. A to Stip., J. A. 22).

That the price paid by Continental was par, and the reserved portion was a deposit, was shown by the provision that:

> "you [meaning Continental] will *deposit** in and credit to us [meaning the customer] in an account to

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* Italics throughout the petition have been added by counsel.

be set up on your books, (which account is hereinafter referred to as the 'Contract Reserve') a sum equal to ten per cent (10%) of the amount then owing by the Buyer under such Contract" (J. A. 22).

The customer agreed, as agent for Continental, to collect the payments due under the installment contracts, and remit the proceeds at four-week accounting periods (J. A. 23-24). In case of defaulted contracts, the customer might remit 90% of the unpaid balance to Continental; and if it did not do so, Continental could charge the unpaid balance of any such contract to the Contract Reserve account (J. A. 25). The agreement provided that any sums in the Contract Reserve account above a specified minimum should be released to the customer from time to time (J. A. 25).

The Contract Reserve account was kept with the individual deposit ledgers of the bank, where deposit accounts of other customers were kept (J. A. 118).

Reasons for Granting the Writ

F.D.I.C. is a federal agency, charged by federal statute with the responsibility of carrying out the high purposes of the congressionally declared policy embodied in the Federal Deposit Insurance Act. The issues presented are clearly questions of federal law. *D'Oench Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456 (1942). No case involving F.D.I.C. has been heard on the merits in this Court for the past fifteen years. For the reasons set forth below, we think this case deserves the Court's attention in respect of each of the three items on which the defendant was held free from insurance assessments.

I.

The deduction of reciprocal bank balances involves important questions of federal law, either not yet settled by this Court, or decided contrary to applicable decisions of this Court.

The decision permitting deduction of reciprocal bank balances should be reviewed because:

(a) the ruling that reciprocal deposits are not received in the "usual course of business" casts doubt on the status of substantial items of bank deposits, and conflicts with the principle of the decision of the Fifth Circuit Court of Appeals in *Constitution Indemnity Co.* v. *Shytles*, 47 F. 2d 441 (1931);

(b) the treatment of F.D.I.C. as an agency of the Federal Reserve System decides a basic question concerning F.D.I.C. which has not been heretofore considered by this Court; and

(c) the ruling that the 1950 amendment of the Act should govern assessments prior to 1950 conflicts with applicable decisions of this Court concerning the use of Congressional Committee reports as criteria of legislative intent.

(a) The ruling that reciprocal deposits are not received in the "usual course of business" merits review by this Court.

The reciprocal portions of bank deposits in insured banks involved in 1950 a volume of approximately $670,000,000 (F.D.I.C. Ann. Rep., 1951, p. 59). In holding that reciprocal deposits are not received "in the usual course of business" (p. 41, *infra*), the Court of Appeals has laid

down a rule that may subject F.D.I.C. to further litigation by other banks, and deplete the insurance fund.

The decision has far more mischievous consequences than the mere failure to collect the assessment claims from Continental. If reciprocal deposits are not received in the "usual course of business", they are not deposits at all under the statutory definition (*infra*, p. 33), and even their net amount is not subject to assessment.

The Fifth Circuit Court of Appeals has held that whether a transaction is in the usual course of business depends on whether it is within the reasonable scope of the business and in furtherance of the business, rather than on how often it is repeated. *Constitution Indemnity Co. v. Shytles*, 47 F. 2d 441 (1931). The cited case deals with coverage under a compensation policy; but the holding below, that a course of business followed by over three hundred large banks is not in the "usual course of business" (p. 41, *infra*), clearly conflicts with the principle of the Fifth Circuit decision.

It cannot be said that reciprocal deposits are outside the scope of a bank's business. They would not be maintained unless they served a useful purpose by eliminating delays in collection of items drawn against the reciprocal bank, and by providing an extra service that helps to cement otherwise profitable customer relationships.

The fact that no interest is earned or paid on these reciprocal balances (see p. 41, *infra*) is of no significance, as Federal law prohibits the payment of interest on any demand deposit (12 U.S.C. §§ 371a, 1828(g)). There is no difference between the earning power of demand balances, whether individual or corporate. All are more or less volatile, but the aggregate is all deposit liability and assessable under the statute. The earning power of a deposit is not a standard under the statute.

The concept that only "ordinary deposits" should be subject to assessment was strongly advanced by the defend-

ant banks in *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y., 1955), and was rejected by the Court after a thorough review of the statutory purpose and background (137 F. Supp. at 155-56). The similarity of this "ordinary deposit" concept to the "usual course of business" test used by the Court below shows that the nature of assessable deposits is subject to such repeated controversy, that it should be settled by this Court.

The doctrine advanced by the Court has relevance to both the 1935 and 1950 Acts, although the specific issue of assessing reciprocal balances has been eliminated by the 1950 Act.

(b) The treatment of F.D.I.C. as an agency of the Federal Reserve System merits review by this Court.

The Court of Appeals cited the treatment accorded reciprocal bank balances by other federal agencies as an important factor, referred to instructions issued by the Comptroller of the Currency and the Federal Reserve Bank, under which only net balances of reciprocal deposits were required to be reported, and said, "The Federal Reserve Bank, *like plaintiff*, was an agency of the Federal Reserve System" (p. 43, *infra*).

In so deciding, the Court of Appeals has created uncertainty concerning the fundamental nature of F.D.I.C. From its inception, F.D.I.C. was created as a separate corporation, not subject to control by either the Comptroller or the Federal Reserve System. F.D.I.C. insurance is available to banks which are not members of the Federal Reserve System (12 U.S.C. § 264(f), 1935 Act; 12 U.S.C. § 1815, 1950 Act). The banks insured by F.D.I.C. at the time of the instructions cited by the Court included 5,081 national banks, 1,598 state banks which were members of the Federal Reserve System and 6,724 state banks which were not members of the Federal Reserve System (F.D.I.C. 1942 Ann. Rep. pp. 68-69). To treat F.D.I.C. as a Federal

Reserve agency when half of F.D.I.C.'s members are not members of the Federal Reserve System, introduces confusion into the relations of both organizations.

Although the Comptroller of the Currency is a member of F.D.I.C.'s three-man board of directors, he has no veto power, and can not be selected as Chairman.* In saying that deposit assessments must conform to the Comptroller's call reports, the Court below gave the call reports an effect which the Comptroller had never claimed for them. The Comptroller is authorized to call for reports of condition from national banks in such form as he may from time to time specify (12 U.S.C. § 161). These "call reports" serve mainly statistical purposes. The Comptroller is not subject to the definition of deposits contained in the Federal Deposit Insurance Act and is free to vary his regulations for call reports as he sees fit without further Congressional action.

The chronology also shows that reliance on instructions from the Comptroller of the Currency and the Federal Reserve Bank was unjustified. Continental adopted its stand for deduction of reciprocal balances in 1937, as an interpretation of the 1935 Federal Deposit Insurance Act, which F.D.I.C. itself had given a contrary interpretation. Netting of reciprocal balances was not permitted by the Comptroller of the Currency or the Federal Reserve until 1942. The Comptroller's 1942 instructions represented a change in practice, "beginning with the current call" (J. A. 161). Federal Reserve also had previously required that reciprocal bank deposits be reported at their gross figures (see *Banking and Monetary Statistics*, 1943 ed., p. 70, a publication of the Federal Reserve Board). Its 1942 circular was described as a "Change in manner of preparing reports of deposits for reserve computation purposes with respect to reciprocal interbank balances" (J. A. 162). The Federal Deposit Insurance Act was amended in 1950 (see

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* 12 U.S.C. § 264(b), 1935 Act; 12 U.S.C. § 1812, 1950 Act.

p. 34, *infra*), but the 1935 Act could not be affected by 1942 rulings of other agencies.

In fact, F.D.I.C. stated in its 1942 report to Congress (pp. 8-9) that it was assessing interbank deposits, and Chairman Crowley testified before the Senate Committee on Banking and Currency on February 17, 1943 that:

> "Not until we have completed our post-war adjustments and have arrived at a comparatively stable post-war economy should we consider any reduction in the assessment rate or any further exemption of types of deposits from assessments." (Hearings on § 700 before Senate Committee on Banking and Currency, 78th Cong., 1st Sess., p. 10.)

The actions of one administrative agency under a statute it is charged with administering cannot be controlled by the action of a different agency administering a different statute. As the Court of Appeals for the Eighth Circuit said in *Helvering* v. *Edison Bros. Stores, Inc.*, 133 F. 2d 575, 579 (1943):

> "Nor can the ruling of one administrative department of the government concerning income accounting control that of another department made for an entirely different purpose under another act of Congress."

See also *Kansas City Southern Ry. Co.* v. *Commissioner*, 52 F. 2d, 372, 378 (8th Cir., 1931); *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 562 (1932).

The decision below is in conflict with the principle of these decisions.

(c) The Court of Appeals disregarded applicable decisions of this Court on the effect of Congressional Committee reports.

The 1950 amendment to the Federal Deposit Insurance Act was relied on by Continental to support its claim for deducting reciprocal bank balances from its assessable deposits.

Under the 1935 Act (quoted at p. 32, *infra*), insurance assessments were based on "the total amount of liability of the bank for deposits (* * * *without any deduction for indebtedness of depositors*)."

The statute makes no differentiation between a deposit liability to a bank customer and to a non-bank customer; nor does it make any differentiation between indebtedness due from a bank depositor and from another depositor. In any case a depositor's indebtedness is not deductible.

The relationship between a bank and a depositor is that of debtor and creditor. *New York County Bank* v. *Massey*, 192 U. S. 138, 145 (1902). Therefore, the deposit of Continental in a reciprocal bank was an indebtedness of that bank to Continental and Continental was forbidden to deduct the amount of such indebtedness in computing its own deposit liabilities.

This was the interpretation which F.D.I.C. consistently gave to reciprocal bank deposits from its creation to the passage of the 1950 statute. This administrative interpretation was entitled to substantial weight (see p. 22, *infra*). Since the assessment of bank deposits for Federal insurance purposes is a creature of statute, the burden is on anyone claiming a deduction from the assessment base to show a statutory basis for such deduction. *Interstate Transit Lines Inc.* v. *Commissioner*, 319 U. S. 590, 593 (1942).

Authority to deduct deposits in reciprocal banks was first given by the 1950 amendment to the Federal Deposit

Insurance Act. The 1950 Act continued the requirement of paying assessments on "the amount of the liability of the bank for deposits * * * without any deduction for indebtedness of depositors", but added a new proviso, in the following terms:

> "*Provided*, That the bank—
>
> "(1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank (other than trust funds deposited by it in such bank) which is subject to immediate withdrawal;" 12 U.S.C. § 1817(a).

The reports of the Congressional committees clearly designated the new proviso as effecting a change in the law. Indeed, that is the usual interpretation when an amendatory statute repeats old language and adds new provisions. *United States* v. *Mc Clure*, 305 U. S. 472, 477-78 (1939); *In re Fuetl*, 247 Fed. 829, 832 (D. Conn., 1917).

In the report of the Senate Committee on Banking and Currency, on the bill which became the 1950 Act, the following statement is made:

> "S. 2822 provides for *changes* in the assessment base. It would permit (a) the deduction from the deposit balance due to an insured bank of the deposit balance due from such insured bank; * * *" (Pl. Ex. 1, J. A. 136; S. Rep. 1269, 81st Cong. 2d Sess., p. 2.)

Similarly, the report of the House Committee on Banking and Currency stated:

> "The assessment base is continued on the total of the bank's deposits. However, in computing the assessment base, *in addition* to the present authorization to deduct therefrom uncollected items and trust funds deposited in another insured bank, the bill permits (a) the deduction from the deposit balance due to an

> insured bank the deposit balance due from such insured bank, * * *'" (Pl. Ex. 2, J. A. 142; H. R. Rep. 2564, 81st Cong. 2d Sess., p. 7.)

This Court has recognized reports of Committees of Congress as among the best criteria of legislative intent, if not actually decisive. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474 (1921); *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 (1940). See Sutherland, *Statutory Construction* (3d Ed., 1943) § 5005.

A committee report was described as "the most authoritative legislative gloss", in *National Labor Rel. Bd.* v. *Lion Oil Co.*, 352 U. S. 282, 292 (1957).

The Court of Appeals referred to the legislative history (p. 43, *infra*), but stated that Congress' adoption of the amendment simply recognized the soundness of defendant's position saying:

> "Nothing was accomplished other than to make certain that which previously had been a matter for statutory interpretation." (p. 43, *infra*)

In construing this amendent, the Court of Appeals has rejected the views of the Congressional Committees, that they were granting the right to a deduction which had not previously existed.

The same argument which Continental made here was rejected, in reference to another clause of the same statute, in *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y., 1955). The case involved assessments on cash collateral accounts, which the F.D.I.C. had treated as assessable under the 1935 Act and which were excluded from the assessment base by the 1950 Act. Judge McGohey cited the same Senate Committee report on which we rely, in support of his holding that the 1950 Act was intended to make changes, and not merely to clarify or interpret the earlier statute (137 F. Supp at 159).

The defendant banks in the *Irving Trust Co.* case accepted the decision without appeal, but the Courts below have adopted a different view of the statute. The importance of the question to F.D.I.C. requires that the issue be settled by this Court.

II.

The double deduction for certain uncollected cash items should be reviewed.

The decision of the Court below, permitting deduction of twice the amount of uncollected cash items which were not received and forwarded on the base day, touches matters of great importance to F.D.I.C. The uncollected cash items may be put into two categories for purposes of this petition, namely, (1) items forwarded on the base day, but disallowed by F.D.I.C. because they had not been received on the base day, and (2) items which were forwarded either prior to the base day (by week-end processing) or after the base day.

The decision below, allowing double deduction for all such items:

(a) departs from prior decisions of this Court concerning the authority of an administrative agency to make regulations; and

(b) holds that amendment of a regulation proves the unreasonableness of the original regulation, a doctrinaire answer to a problem which this Court has not yet settled.

One underlying error should first be mentioned.

The Court of Appeals seems to have given no heed to the fact that method (aa) under the statute authorized certain uncollected cash items to be *multiplied by two,* in return for not being permitted to deduct all uncollected items. It adopted Continental's argument that failure to grant

the deduction was to penalize efficiency, inasmuch as the items could have been deducted (multiplied by two) if they had been held for forwarding on Monday (p. 48, *infra*). This overlooks the real purpose of week-end processing of cash items, namely, to expedite their collection. This purpose was so effectively served that substantial amounts of items forwarded during the week-end were actually collected on the following Monday (J. A. 6, 91). Continental finally paid the assessment on items so collected, after the trial began (J. A. 60). But items not yet collected on Monday had also been expedited.

It was no more justifiable to deduct twice the amount on Monday of items forwarded on preceding days than it would be on a Tuesday to deduct twice the amount of items forwarded on Monday.

(a) The Court's restriction on F.D.I.C.'s power to make regulations should be reviewed.

A single calculation will show how costly it may prove to invalidate the F.D.I.C.'s requirement that items for which double deduction is claimed must have been received on the base day. This regulation applies to every day in the week, and not simply to Mondays. A double deduction at the rate of 1/12th% per annum for a six-month period is equivalent to 1/12th% of the amount of each item. If items received on a Thursday (as an example) are held over to be forwarded on a Friday base day, the 1/12% deduction that is received for one day's deferment of the availability of the money represents a return at the rate of 30% per annum on the amounts involved. The regulation was a means of guarding against such an unintended bonanza for insured banks. The invalidation of the regulation creates a loophole which may tempt banks to delay the processing of items received shortly prior to any base day.

The Court, which admitted that its members "are far from experts in the refinements of the banking business" (p. 42, *infra*), should not have interfered with regulations which F.D.I.C. adopted to deal with the refinements of the banking business.

The 1950 statute permits double deduction of uncollected cash items "forwarded for collection on the assessment base days", without expressly requiring that they be received on the base day (12 U.S.C. § 1817(a)(1)(iii)(aa); p. 34, *infra*). This statute granted F.D.I.C. both specific and general power to adopt regulations. Section 1817(a)(1)(iii) authorized it to "define the terms 'cash items', 'process of collection', and 'uncollected items' and * * * fix the maximum period for which any such item may be deducted" (p. 35, *infra*). In addition, Section 1819, Tenth gave F.D.I.C. power to prescribe "such rules and regulations as it may deem necessary to carry out the provisions of this chapter" (p. 36, *infra*).

The regulations adopted under this authority are printed in the Joint Appendix (J. A. 175-204).

Regulation 327.2 provides that items used as a basis for double deduction must be both *received* and forwarded on the base day (J. A. 177, 183). The requirement is logically inherent in the statute itself, as a basic distinction between the single deduction allowed under the (bb) method and the double deduction allowed under the (aa) method. The regulation was entitled "327.2. Period of deduction for uncollected cash items", and in fact fixed a maximum period for deduction, by forbidding banks to obtain extra deductions for items whose presentation they themselves delayed.

This regulation was first published in the Federal Register as a proposal, with formal notice of rule-making (15 F. R. 7724, J. A. 175). Subsequently the regulation was adopted, and published in full in the Federal Register on December 6, 1950 (15 F. R. 8628; J. A. 179, 182-83). The Instruction Sheet furnished to all insured banks in De-

cember 1950 (J. A. 74) stated that deduction of cash items would be allowed only for those forwarded for collection on the assessment base day which were *received* on said days (Pl. Ex. 3; J. A. 144). Although certain of the 1950 regulations were amended in 1954 after F.D.I.C.'s conference with the American Bankers Association's Committee on Assessments (J. A. 85), the 1954 revision continued the requirement that cash items be received and forwarded on the base day (J. A. 188, 197).

This Court has held that a regulation adopted contemporaneously with the passage of a statute, by the agency charged with its supervision, has the same force as though prescribed in terms by statute.

> *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349 (1920).

The Court of Appeals did not apply the standard which this Court in *Fawcus Machine Co.* v. *United States*, 282 U. S. 375 (1931) held applicable to administrative regulations:

> "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons." (p. 378)

See also *McLaren* v. *Fleischer*, 256 U. S. 477, 481 (1921); *Lucas* v. *American Code Co., Inc.*, 280 U. S. 445, 449 (1930); *United States* v. *Bergh*, 352 U. S. 40, 46-47 (1956).

In fact, the Seventh Circuit decision below is in conflict with the principle of the decision by the Eighth Circuit Court of Appeals that:

> "the burden is upon those who attack an administrative regulation (when power to make regulations is given by Congress) to make its invalidity so manifest that the court has no choice except to hold the regu-

lation inappropriate to the end specified in the Act of Congress." *Knight* v. *Mantel*, 135 F. 2d 514, 517 (1943).

Under these standards it was also reasonable for F.D.I.C. to treat the base day as excluding prior days, whether they were week-days or week-ends.

Generally, a day means a calendar day of 24 hours, running from midnight to midnight.

Rock Finance Co. v. *Central National Bank*, 339 Ill. App. 319, 89 N. E. 2d 828, 832 (1950);
Kirkpatrick v. *King*, 228 Ind. 236, 91 N. E. 2d 785, 789 (1950);
American Nat. Bank v. *Service Life Ins. Co.*, 120 F. 2d 579, 581 (7th Cir., 1941).

Words can properly be given their ordinary meaning.

Crane v. *Commissioner*, 331 U. S. 1, 6 (1947).

The Court of Appeals also referred to a provision on Continental's deposit slips that the deposit was conditional, and might be treated as received on the succeeding business day (p. 45, *infra*). The text of this stipulation was: "All items received for deposit or collection after regular banking hours *may be deemed* for all purposes to have been received for deposit or collection by the Bank as of the succeeding business day, although the Bank, in its discretion, *may handle the items* or put through the credit *on the same day* the deposit is received" (Reverse side of Ex. C to Stip., not printed in the Joint Appendix). The opinion below did not discuss the inconsistency between handling the items over the week-end and still asserting that they were received "for all purposes" (including the claim of double deduction) on the succeeding Monday. It seems clear that Continental could not properly handle the deposited items and forward them on Friday or Saturday, and still assert for deposit assessment purposes that they were not received until Monday.

In denying effect to the regulations described above, the Court of Appeals was clearly inconsistent with applicable decisions of this Court.

(b) This Court should review the holding that F.D.I.C.'s 1954 regulation was retroactive.

In 1954, F.D.I.C. adopted new regulations, which defined "base day" as covering the period from the closing of the books on the last preceding business day to the closing of the books on the base day, and expressly including intervening holidays and non-business days. These new regulations were published with notice of rule-making, and subsequently adopted (19 F. R. 1019; J. A. 184; 19 F. R. 1663; J. A. 193).

The Court of Appeals treated this 1954 regulation as "recognition" by F.D.I.C. that its prior practice constituted an "unreasonable limitation" on the meaning of the statute (p. 48, *infra*). In effect, it held that amendment of a regulation is a confession of prior error.

As already mentioned (p. 9, *supra*), F.D.I.C. informed the representatives of the American Bankers Association that its 1954 amendments to the regulations would not be retroactive. The regulation of 1954 as published, stated that it applied to assessment base days commencing March 31, 1954 (J. A. 193 *et seq.*). Mr. Anderson of F.D.I.C. stated that "it would be chaotic to change it for the past with respect to some 13,000 banks" (J. A. 86). The Court below has created chaos or gross inequity, or both, by making the 1954 regulations applicable retroactively to Continental, after all other banks have paid assessments under the terms of the 1950 regulations.

In support of its view, the Court of Appeals (pp. 48-49, *infra*) quoted from this Court's opinion in *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 135 (1936) that:

> "Since the original regulation could not be applied, the amended regulation in effect became the primary

and controlling rule in respect of the situation presented."

The *Manhattan General Equipment* case should not control the facts here presented. The original regulation in that case would have been inconsistent with the statute and unreasonable as applied to the facts in the case (297 U. S. at 135). In the present case, there is no reason why the 1950 regulation "could not be applied". It had been applied to all banks but Continental, and it was a sensible construction of and consistent with the statute.

In the 1954 regulation, F.D.I.C. was stretching the meaning of "base day" to cover a three-day week-end, and thereby giving banks an additional benefit. By this time the experience under the 1950 statute had shown that the insurance fund could afford to permit such leniency. But the 1954 regulation should be recognized as an exercise of leniency. If one of the two regulations must fall as inconsistent with the statute, it should be the 1954 one rather than the 1950 one. In reaching the opposite result, the Court of Appeals not only rejected a justifiable administrative interpretation, but violated the general principle against making either a statute or a regulation retroactive.

In rejecting the regulation requiring that items claimed for double deduction be received on the base day, the Court held that the "literal language of the statute" must govern (p. 46, *infra*). But the 1954 regulation expanding the meaning of base day clearly went beyond the "literal language of the statute". The Court was guilty of extreme inconsistency in invalidating the first regulation and sustaining the latter. Moreover, in applying the 1954 regulation retroactively, the Court, in effect, amended the statute by a regulation which expressly stated that it was not to apply to the prior period.

The presumption against retroactive application was expressed by this Court in *Miller* v. *United States*, 294 U. S. 435, 439 (1935):

"The law is well settled that generally a statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears * * *. An administrative regulation is subject to the rule equally with a statute;"

See also Rutledge, J. dissenting, in *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 640-41 (1944).

The power of administrative agencies to alter or amend their regulations, and the effect of such amendments, is an area which has been seldom presented to this Court. This Court has upheld an agency's power to change prospectively interpretations it has previously promulgated.

Helvering v. *Wilshire Oil Co.*, 308 U. S. 90, 100 (1939).

Lower Federal courts have questioned the power to make an amendment retroactive.

Lesavoy Foundation v. *Commissioner*, 238 F. 2d 589, 593-94 (3rd Cir., 1956);
See Von Baur, *Federal Administrative Law* (1942) § 493;
Cf. Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 413-15 (1941).

This Court has not heretofore dealt with the problem of whether amendments of administrative regulations should be given other than prospective application.

In this same regulation there is a provision which excludes from the deduction of cash items checks received for the sale of assets (§ 327.1(b) J. A. 195). This part of the regulation takes away a privilege which banks previously enjoyed. If applied retroactively it would require payment of assessments on a substantial volume of items previously excluded from deposits. But Continental does not claim that this part of the regulation should be retroactive. It argues that those parts of the regulation that are beneficial should be given retroactive effect but those

parts that are detrimental should be prospective only. Such an argument is fallacious. The regulation is an entire one. It was adopted at one time in conformance with the rule making power. It deals with the same subject matter. It should therefore be either wholly prospective or wholly retroactive.

In this single case, the assessments involved for one bank on a retroactive application of the 1954 regulation total about $65,000. If the same ratio exists in other insured banks, whose deposits totaled $193 billion at the end of 1954 (F.D.I.C. Ann. Rep., 1954, p. 139), the retroactive application of the regulation may involve refund claims running into millions of dollars. F.D.I.C. did not intend to impose such a burden on itself, and should not be subjected to that risk by a court's retroactive application of a regulation that F.D.I.C. expressly stated was not retroactive.

III.

The exclusion of dealer reserves from deposits should be reviewed.

The Court of Appeals' refusal to treat "dealer reserves" as assessable deposits involves a decision of another important Federal question which has not been decided by this Court and on which lower Federal courts are in conflict.

The facts concerning this item have already been set forth (*supra*, pp. 9-10).

F.D.I.C. has always considered that the definition of "deposit" in the 1935 Act, repeated verbatim in the 1950 Act, is broad enough to include all sums which a bank holds in any account for a customer. The statute defines a deposit as "the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account" (12 U.S.C. § 264(c)(12), 1935 Act; 12 U.S.C. § 1813(l), 1950 Act).

The Court of Appeals gave three reasons for refusing to treat the account as a deposit: (a) that the account was only a conditional credit, (b) that the contract which the bank purchased was not "money or its equivalent", and (c) that the account was not a "commercial" account, because it could not be used in commerce except under the restriction imposed by the contract.

We believe that all these reasons are unsound.

(a) The idea that only unconditional credits to a customer's account should be included within the definition of deposits was rejected by Congress in 1935. The original draft of the bill included the word "unconditional" in the definition of deposits, but it was stricken from the bill as passed by the Congress. The original bill (H. R. 7617, 74th Cong., Sec. (c)(12); see H. Rep. No. 742) read:

> "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give *unconditional* credit to a commercial, checking, savings, time or thrift account, * * *." (Compare 12 U.S.C.A., 264 (c)(12)).

(b) The agreement provided in effect that the contracts were purchased at par, and that the bank would "deposit" the 10% reserve in a special account for the customer (J. A. 22).

The relationship created by the agreement and the credit to the "Contract Reserve" account is no different from that existing between a bank and a customer when any deposit is made. Instead of defendant paying the full purchase price of the commercial paper in cash to the customer and having the customer redeposit 10% of it with the bank, the same result was attained by retention of 10% of the purchase price by defendant and by a *credit* for and deposit of that amount to the customer (J. A. 22). Cf. *Davis* v. *McNair*, 48 F. (2d) 494, 496 (5th Cir., 1931).

In many instances when a bank makes a loan or discounts commercial paper it insists on the customer main-

taining a substantial sum on deposit. The resulting accounts give rise to deposits, which F.D.I.C. has always treated as the "equivalent" of money and assessable. This, the first decision to the contrary, opens the possibility of dispute concerning many items beside dealer reserves unless it is corrected.

(c) The account grew out of the commercial business of the bank. F.D.I.C. was reasonably justified in treating it as a "commercial" account. The Court's failure so to treat it constitutes another example of departure from general rules of administrative regulatory power.

On all these counts the decision of the Court of Appeals is squarely contrary to the decision of the District Court for the Eastern District of Missouri in *Industrial Bank of St. Louis* v. *Federal Deposit Ins. Corp.*, 93 F. Supp. 916, 918 (1954). That case held that "dealer reserves" were assessable as deposits. Those accounts, too, arose out of the purchase of installment paper and were not subject to withdrawal until the installment paper was paid in full.

The Court of Appeals' decision is also inconsistent with *Federal Deposit Ins. Corp.* v. *Irving Trust Co.*, 137 F. Supp. 145 (S.D.N.Y. 1955). The *Irving Trust Co.* case held cash collateral to be assessable even though the right to withdrawal was restricted, rejecting the narrow definition of deposits which was adopted by the Court of Appeals here.

The Court of Appeals' decision is also inconsistent with its own position in this case when it correctly held that money withheld by defendant for salaries and wages of its employees for payment of taxes and Government securities for employees were the equivalent of cash and that the situation was the same as though the amounts withheld had been paid to employees and returned by them to the bank to be used for the purposes indicated. Here the defendant, instead of paying the balance of the purchase price of the instalment paper to the customer to be

returned by him and placed in an account to his credit, placed such balance to his credit.

The fact that the account was not subject to withdrawal by check does not destroy its character as a deposit. In *Fidelity Bank and Trust Co.* v. *Eli-Walker Dry Goods Co.*, 77 S. W. (2d) 480, 483 (Mo. 1934) the Court said:

> "* * * It is true that such fixed deposit was not subject to be checked against without the bank's consent, *but such fact is of no great significance* since it is well understood that deposits may be general, although not carried in a checking account."

The dealer reserve item is in issue through the period ending June 30, 1950. Thereafter, the 1950 amendment to the Federal Deposit Insurance Act permitted banks to exclude from the assessment base "cash funds which are received and held solely for the purpose of securing a liability to the bank *but not in an amount in excess of such liability*" (12 U.S.C.A. § 1817(a)(2)(ii)).

The fact that the exclusion was limited to the amount owed to the bank conclusively shows that cash collateral accounts are in law deposits.

The exemption from paying assessment deposits on cash collateral such as dealer reserves was granted as a special exclusion from the assessment base (see text of amendment at p. 35, *infra*). The report of the House Committee on Banking and Currency shows that Congress recognized cash collateral as having been assessable prior to 1950 and intended to create a new exclusion for the benefit of the banks "in addition" to existing deductions (Pl. Ex. 2, J. A. 142; H. R. Rep. 2564, 81st Cong., 2d Sess).

The decision below has an importance, however, which goes beyond the period covered by the 1935 Act. The Court of Appeals has held that dealer reserves are not deposits at all. In so doing it has adopted a permanent limitation on the statutory definition of "deposit", by

holding that deposits must be unconditional, that commercial paper purchased by a bank is "money or its equivalent" only to the extent of amounts immediately paid out in cash and not to the extent of any balance which by agreement is placed to an account to the credit of the customer, and by holding that such an account which arises out of a commercial transaction with the bank is not a "commercial account". The holding has created serious problems for F.D.I.C., which ought to be settled by this Court.

CONCLUSION

A writ of certiorari should be issued to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated: September 17, 1957.

Respectfully submitted,

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APPENDIX I

Statutes Involved

1935 Federal Deposit Insurance Act, 12 U.S.C., Sect. 264:

"(c) As used in this section—

• • •

"(12) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage; • • •

"(13) The term 'insured deposit' means the net amount due to any deposit or deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of $5,000. • • •

• • •

"(h) (1) The assessment rate shall be one-twelfth of 1 percentum per annum. The semiannual assessment for each insured bank shall be in the amount of the product of one-half the annual assessment rate multiplied by an assessment base which shall be the average for six months of the differences at the end of each calendar day between the total amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph (12) of subsection (c) of this section, without any deduction for indebtedness of depositors) and

the total of such uncollected items as are included in such deposits and credited subject to final payment: ***Provided, however,*** That the daily total of such uncollected items shall be determined according to regulations prescribed by the board of directors upon a consideration of the factors of general usage and ordinary time of availability, and for the purposes of such deduction no item shall be regarded as uncollected for longer periods than those prescribed by such regulations: * * *"

1950 Federal Deposit Insurance Act, 12 U.S.C.

"§ 1813. Definitions

"As used in this chapter—

* * *

"(l) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the Board of Directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage: * * *

"(m) The term 'insured deposit' means the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of $10,000. * * *

• • •

"(p) The term 'trust funds' means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent."

• • •

"§ 1817. Assessments—Rate and amount; base, deductions; form and contents of certified statements.

"(a) The assessment rate shall be one-twelfth of 1 percentum per annum. The semiannual assessment for each insured bank shall be in the amount of the product of one-half the annual assessment rate multiplied by the assessment base. The assessment base shall be the amount of the liability of the bank for deposits, according to the definition of the term 'deposit' in and pursuant to subsection (1) of section 1813 of this title, without any deduction for indebtedness of depositors: *Provided*, That the bank—

"(1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank (other than trust funds deposited by it in such bank) which is subject to immediate withdrawal; (ii) trust funds held by the bank in a fiduciary capacity and which are deposited in another insured bank; and (iii) cash items as determined by either of the following methods, at the option of the bank; (aa) By multiplying by 2 the total of the cash items forwarded for collection on the assessment base days (being the days on which the average deposits are

computed) and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts; or (bb) by deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts, plus such uncollected items paid or credited on preceding days which are in the process of collection: *Provided,* That the Board of Directors may define the terms 'cash items', 'process of collection', and 'uncollected items' and shall fix the maximum period for which any such item may be deducted; and

"(2) may exclude from its assessment base (i) drafts drawn by it on deposit accounts in other banks which are issued in the regular course of business; and the amount of any advices or authorizations, issued by it for cash letters received, directing that its deposit account in the sending bank be charged with the amount thereof; and (ii) cash funds which are received and held solely for the purpose of securing a liability to the bank but not in an amount in excess of such liability, and which are not subject to withdrawal by the obligor and are carried in a special non-interest-bearing account designated to properly show their purpose.

"Each insured bank, as a condition to the right to make any such deduction or exclusion in determining its assessment base, shall maintain such records as will readily permit verification of the correctness thereof. The semiannual assessment base for one semiannual period shall be the average of the assess-

ment base of the bank as of the close of business on March 31 and June 30, and the semiannual assessment base for the other semiannual period shall be the average of the assessment base of the bank as of the close of business on September 30 and December 31; *Provided,* That when any of said days is a nonbusiness day or a legal holiday, either National or State, the preceding business day shall be used. The certified statements required to be filed with the Corporation under subsections (b) and (c) of this section shall be in such form and set forth such supporting information as the Board of Directors shall prescribe. The assessment payments required from insured banks under subsections (b) and (c) of this section shall be made in such manner and at such time or times as the Board of Directors shall prescribe, provided the time or times so prescribed shall not be later than sixty days after filing the certified statement setting forth the amount of assessment."

* * *

"§ 1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

* * *

"Tenth: To prescribe by its Board of Directors such rules and regulations as it may deem necessary to carry out the provisions of this chapter."

APPENDIX II

Opinion of Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 11933-4 OCTOBER TERM, 1956, APRIL SESSION, 1957

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellant,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellee.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

June 25, 1957

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

MAJOR, *Circuit Judge.* Plaintiff, Federal Deposit Insurance Corporation (sometimes referred to as FDIC), is a

corporation duly organized and existing under and by virtue of an Act of Congress of the United States as amended by the Act of August 23, 1935 (Title 12 U.S.C.A. Sec. 264) and again by the Act of September 21, 1950 (Title 12 U.S.C.A. Sec. 1811), designated as the Federal Deposit Insurance Act. Defendant, Continental Illinois National Bank and Trust Company of Chicago (sometimes referred to as Continental), is a duly chartered and organized national banking association with its principal place of business in the City of Chicago, Illinois, and at all times pertinent to the instant suit was an insured member bank as defined by Title 12 U.S.C.A. Sec. 1813.

The present action was instituted to recover assessments, for the period from July 1, 1948 through June 30, 1953, alleged to be due from defendant under the statutes relating to federal deposit insurance. Numerous items were placed in issue by the pleadings, all but four of which were settled by agreement of the parties. On these a trial was had by the court upon a party stipulation, together with documentary and oral testimony. The court, in conformity with its findings and conclusions, entered judgment in favor of plaintiff on two of such items and in favor of defendant on the remaining items. Each of the parties appeals from that portion of the judgment adverse to it.

An insured bank is, under the Act, made liable for assessments, the base for which is its deposits, as the latter term is defined and contemplated by the Act. All the items in dispute involve the treatment to be accorded certain alleged deposits, that is, whether they constitute a portion of the base for assessment purposes.

The four items, giving rise to as many contested issues, are as follows:

1. Whether in case of reciprocal deposit accounts with other banks defendant's liability for assessments

under the Federal Deposit Insurance Act of 1935 is measured by the gross or net balance of the accounts.

2. Whether under the Federal Deposit Insurance Act of 1950 defendant was entitled to deduct from the amount of its total deposits the amount of various uncollected cash items in process of collection on the "base day." This item includes government bonds, cashed by defendant on the assessment date but neither collected nor credited to deposit accounts on that date.

3. Whether the amounts of credits arising under the so-called "contract reserve" account constituted deposits under the Federal Deposit Insurance Act of 1935.

4. Whether the amounts of payroll deductions and taxes deducted by defendant from its employees' salaries constituted trust funds or deposits within the meaning of the 1935 and 1950 Acts.

In the district court issues 1 and 2 were decided adversely to plaintiff, while 3 and 4 were decided adversely to defendant. We shall discuss these issues in the order of their enumeration.

CONTESTED ISSUE 1

Reciprocal accounts exist where two banks maintain deposit accounts with each other. Such accounts are termed "due to" and "due from" accounts. Defendant maintained reciprocal bank accounts with 26 large banks in 9 principal cities throughout the country. It is defendant's position that only the net amount, if any, due another bank constituted the measure of deposit liability and became a part of the assessment base. In contrast, plaintiff contends that the deposit of another bank in Continental is to be

accorded the same treatment as any other deposit and that the gross amount of the deposit is the assessment base, irrespective of the amount of Continental's deposit in such other bank.

The stipulation contains an illustration of the method Continental followed in handling reciprocal bank balances in computing its assessment base, as follows: "If bank 'A' had a deposit account in Continental of $250.00 and Continental had a deposit balance in bank 'A' of $100.00, Continental would include only the difference in its deposit liabilities for assessment purposes, namely $150.00. If the conditions were reversed and bank 'A' had a deposit balance in Continental of $125.00 and Continental had a deposit balance in bank 'A' of $300.00 Continental would not include any of the deposit due to bank 'A' in its deposit liabilities for assessment purposes."

The relevant portion of the 1935 Act as it pertains to the issue under discussion is contained in Sec. 264 (h)(1), which provides among other things that the assessment base shall be determined by the "* * * amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph (12) of subsection (c) of the section, without any deduction for indebtedness of depositors)." The last named subsection states: "The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account * * *, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage * * *."

This appears to be an appropriate point to take note also of the 1950 Act, even though the issue is for decision

under the terms of the 1935 Act. Title 12 U.S.C.A. Sec. 1817 (a) contains, so far as it relates to the point under discussion, substantially the same language as that contained in the 1935 Act, with the following proviso: "Provided, That the bank (1) may deduct (i) from the deposit balance due to an insured bank the deposit balance due from such insured bank * * *." Plaintiff makes much of the point that Congress by this proviso amended the law so as to allow a deduction not theretofore permitted by the 1935 Act. Otherwise, so it is suggested, there would have been no purpose on the part of Congress in adopting the proviso. The district judge rejected this reasoning and stated in a memorandum opinion "that the pertinent provisions of the 1950 statute merely clarified the previous statute."

No other court has decided the issue under discussion, so far as we are aware. The issue, therefore, must be determined from the statutory language, together with such aids to construction as may be available. It appears plain that the assessment base is the deposit liability of the bank but that this does not encompass all of a bank's accounts even though labeled as deposits. It is the ordinary and usual deposits of a bank which measure its strength, its growth and development. The principal earnings are derived from its investment of such deposits. If a bank lends to a depositor, it receives interest on such indebtedness the same as though the deposit had been otherwise invested. In contrast, reciprocal deposits are for the convenience of the banks involved and their customers. They add nothing to the earnings of either bank except the bank which holds a net balance. If all the loanable assets of a bank were deposited in reciprocal accounts, it could not long survive.

Congress defined a deposit as the money received by a bank in the "usual course of business." Reciprocal deposits, in our view, are not thus received. This view is

fortified by the fact that out of a total of 13,600 insured banks in the country, not more than three to four hundred carried reciprocal accounts. In other words, out of all in-insured banks fewer than 3% maintained the character of deposits with which we are now concerned.

Using the stipulated illustration heretofore noted, was the deposit liability of Continental to bank "A" $250.00, the amount of "A's" deposit with Continental, or was it $150.00, the difference between the amount of Continental's deposit with bank "A" and the latter's deposit of $250.00 with Continental? While we are far from experts in the refinements of the banking business, it borders on the fictional, so we think, to assert that Continental's deposit liability was more than $150.00, the difference between the two deposits. If "A" had $15.00 in his pocket which belonged to "B", and "B" $10.00 in his pocket which belonged to "A", the latter's liability to "B" would be $5.00 rather than $15.00. Any other conclusion would ignore the realities of the situation, including the actual relationship existing between the parties.

As might be expected, plaintiff places much reliance upon the language contained in Sec. 264 (h)(1) which provides that deposits shall be included in the assessment base "without any deduction for indebtedness of depositors." Obviously, this language is of no benefit to plaintiff if the term "deposit" is accorded its usual and ordinary meaning. Moreover, in the illustration used, bank "A" had no indebtedness to Continental; the latter was indebted to bank "A" in the amount of $150.00. This amount Continental agrees would have been includible in its base for assessment purposes.

Plaintiff relies upon its administrative interpretation of the statute, consistent with the position which it now takes. Defendant, however, has at no time acquiesced in such

interpretation; in fact, it has consistently from the beginning urged the position which it now takes. In the view which we take of the purpose and intendment of the statute, we are not impressed with plaintiff's interpretative ruling.

Plaintiff has a more plausible argument based upon the 1950 amendment which, as heretofore shown, expressly provided for the exclusion of a reciprocal deposit in another bank. Our attention is called to the legislative history relative to this amendment which indicates that Congress regarded the proviso as an amendment rather than as an interpretation of the previous statute. The district court expressed the view that the 1950 amendment was merely a clarification of the previous statute. We think it not of controlling importance whether the latter Act be treated as an amendment or a clarification. The fact is that a controversy existed between plaintiff and defendant (as well as other banks) relative to the issue under consideration, and to resolve such controversy Congress added the proviso. By such action Congress recognized the soundness of defendant's position. However the proviso be characterized, the doubt theretofore existing was resolved. Nothing was accomplished other than to make certain that which previously had been a matter for statutory interpretation.

More important is the treatment accorded reciprocal bank balances by other federal agencies. The Federal Reserve Bank, like plaintiff, was an agency of the Federal Reserve System. The Federal Reserve Bank instructed its members carrying reciprocal accounts to report only the net balances of such accounts. The Comptroller of the Currency also called for a report of only the net balances of reciprocal deposits. We think, contrary to plaintiff's contention, that this evidence was properly admitted. Cer-

tainly it shows a recognition by these agencies of the actual relationship existing between banks with reciprocal accounts. More than that, the rulings are consistent with and lend support to the view that such deposits are not received in the "usual course of business," and that the bank receiving such deposits incurs liability only to the extent of the net balances of such deposits. We agree with the holding of the district court on this issue.

CONTESTED ISSUE 2

This issue relates to cash items, that is, checks, drafts and other instruments providing for the payment of money which a reporting bank received in the regular course of business and paid or credited conditionally to a deposit account. These items are called "float" and, in a bank the size of defendant, many thousands are handled each day. The period involved is from 1950 to 1954.

The 1935 Act provided for an assessment base consisting of the average daily deposits at the end of each calendar day for six months, deducting, however, "the total of such uncollected items as are included in such deposits and credited subject to final payment." The 1950 Act changed the assessment provision so as to simplify the work of the banks incident to the ascertainment of the average deposit liability during the semiannual periods. There were designated as base days March 31 and June 30 for the first and September 30 and December 31 for the second semiannual period. Two methods were provided for computing the amount of such deposits, that is, the (aa) method and the (bb) method. Defendant utilized the former, which provides that the reporting bank may deduct cash items as determined "by multiplying by 2 the total of the cash items forwarded for collection on the

assessment base days (being the days on which the average deposits are computed) and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts." (Sec. 1817 of the 1950 Act.)

The items here involved are only those "forwarded for collection." Plaintiff in its brief classifies such items as follows:

> "1. Cash items received and forwarded prior to the base day.
>
> 2. Cash items received prior to the base day and forwarded on the base day.
>
> 3. Cash items received on the base day and forwarded on the following day."

The items in class 1 were received after the close of business on a Friday and forwarded for collection on Saturday or Sunday preceding Monday, a base day, but remained uncollected on that day. The items in class 2 were received in the interim between the closing of the bank on Friday and the opening of the bank on Monday, but not forwarded for collection until the latter day. The items in class 3 were received on Monday but not completely processed and forwarded until the following day. All of the items in the three classes were conditionally credited on Monday, the base day.

Upon receipt of a "float" deposit, the bank issued a slip which provided in effect that the deposit was conditional, with the right reserved to refuse to honor or pay checks drawn against such deposit. It was also provided that items received for collection after regular banking hours might be treated by the bank as a deposit or collection of the succeeding business day.

The class 2 items are clearly deductible. They were forwarded for collection on base days and are in compliance with the literal language of the statute. Plaintiff in its brief states:

> "The items in this category meet the requirement of the statute of being forwarded for collection on the assessment base day, but they do not meet the requirement of the regulation that they must have been received on the base day. We must, therefore, consider whether the regulation is consistent with the statute."

Plaintiff makes the feeble argument that a regulation promulgated in 1950 required that the items be both received and forwarded on base days. This regulation, insofar as it required receipt of such items on base days, is in effect an amendment of the statute, it is inconsistent therewith and in that respect is void.

Class 1 and class 3 items present a more difficult problem. As noted, the former includes items both received and forwarded on Saturday or Sunday preceding a base day but which remained uncollected on the base day and for which the depositor had not previously received credit. Class 3 items were received on the base day but not processed and forwarded until the following day. The depositor, as to this class of items, received only a conditional credit on the base day.

The controversy as to class 1 and class 3 items depends upon an interpretation of the term "base days" as employed in the statute. Plaintiff made no attempt to interpret or define "base days" until it promulgated a regulation in 1954, entitled "Periods of Deductions for Uncollected Items." (Sec. 327.1 (a) of the 1954 Regulations.) The regulation provided:

Appendix II

> **"The term 'base day' shall be the period of time beginning with the time of the closing of the books of the bank on the last business day immediately preceding the assessment base day to the time of the closing of the books of the bank on the base day according to the normal practice of the bank. Holidays and other nonbusiness days intervening between the preceding business day and the base day are a part of the base day."**

Paragraph (f) of the same section of the regulation provided:

> **"A cash item shall be deemed to have been forwarded for collection on the base day if it has been received for collection on the base day and has been either forwarded for collection on that day or is in the process of forwarding in accordance with the normal procedure of the bank, even though the item may be in the possession of the bank at the time of the closing of the books on the base day."**

It is plain that class 1 items are now deductible under paragraph (a) and that class 3 items are now deductible under paragraph (f) of the regulation. This much appears to be conceded because plaintiff's suit covers only the period between the amendment of the Act in 1950 and the promulgation of the 1954 regulation.

Plaintiff contends that the term "base day" as used in the statute should be interpreted to mean a calendar day, that is, the time from one midnight until the next. Any merit in this contention appears to be dissipated from the fact that plaintiff in 1954 defined "base days" in the manner above shown without any change by Congress in the statutory language. If a base day meant a calendar day in 1950, it must have meant the same in 1954. If it en-

compassed only a calendar day when the amendment was enacted, we think a serious question would be raised as to the validity of the 1954 regulation which defined a base day as including Saturdays and Sundays prior thereto, as well as the day following as to certain designated items.

In any event, the 1954 regulation constitutes a recognition on the part of plaintiff of the unreasonable limitation which it would have us place upon the meaning of "base day" as used in the statute. The situation before us is an apt illustration. If defendant had permitted the accumulation of all cash items between the time it closed its bank for business purposes on Friday until it opened on Monday (a base day) and had forwarded such items on that day, there could be no question as to their deductibility. To hold that they are not deductible because the bank, in keeping with efficiency and sound banking practices, maintained a force for the purpose of forwarding such items on Saturday and Sunday, is barren of any logic, as plaintiff's 1954 regulation appears to recognize.

Much is said as to whether the 1954 regulation should be applied retroactively so as to cover the items in issue. Defendant argues in the affirmative, plaintiff in the negative. We think this issue need not be resolved. If plaintiff had the authority in 1954 to interpret the statute as it did, we think a court has the authority to place a like interpretation upon the statute during the period from 1950 to 1954. In *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, it was contended that an amended regulation was void because it was retroactive. The court rejected the contention, but in doing so made the following pertinent observation (page 135):

> "Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation pre-

sented. It pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute."

Included in contested issue 2 are government bonds cashed on base days and held by defendant for collection at the close of such days. It is urged that such bonds are not "cash items," and that a distinction should be drawn between them and checks and bank drafts. We are not impressed with this argument. In our view, all the items included in contested issue 2 were deductible.

CONTESTED ISSUE 3

A brief statement of the facts will suffice to bring into focus the issue for decision. In financing installment paper defendant purchased sales contracts from a customer (a dealer engaged in selling retail merchandise on credit to a person sometimes called the buyer), without recourse, under an agreement which provided for remittance to the customer of 90% of the amounts owing under such contracts (less 1/8 of 1% cash discount), and crediting the remaining 10% to an account set up on defendant's books and designated as the customer's "Contract Reserve." The agreement referred to the "Contract Reserve" as a deposit credited to the customer to be used in accordance with the terms of the agreement. In brief, the "Contract Reserve" account was utilized as a means of securing the defendant for the balance due on the sales contract made between the buyer and the dealer and sold and assigned by the latter to defendant. The agreement between the customer (dealer) and the bank provided that the reserve account should be maintained at a specified level. When below that level, the difference was to be made up by the customer; when above the level, and then only, the cus-

tomer was entitled to draw on the account. In practice, only credit was extended to the buyer, no withdrawal was permitted.

As relating to the question for decision, it can be stated that the sole purpose of the arrangement between the customer and the bank was to secure the latter and this was accomplished by withholding 10% of the contract purchase price. If the buyer satisfied his obligation, the 10% belonged to the customer. If, however, there was a default in payment by the buyer, the bank could utilize the reserve account to the extent necessary to prevent any loss on its part.

The asserted liability is for a period prior to 1950, when the Act was amended in a manner which apparently provided that the alleged deposits under discussion are excludible from the tax base. The question, therefore, must be decided under the 1935 Act.

The district court decided this issue adversely to defendant. In our view, this was error, notwithstanding there is some authority, to which we shall subsequently refer, which furnishes support for plaintiff's position. In connection with our discussion, under contested issue 1 we have set forth the statutory definition of an assessment base as being the "* * * amount of liability of the bank for deposits," as well as the definition of the term "deposit."

Plaintiff in its brief under the present issue has set forth the statutory definition of "deposit" by breaking it down into separate phrases which we think pertinent even though it amounts to repetition. The statutory definition thus treated is as follows:

"(a) 'The unpaid balance'

(b) 'of money or its equivalent'

(c) 'received by a bank'

(d) 'in the usual course of business'

(e) 'and for which it has given or is obligated to give credit'

(f) 'to a commercial, checking, savings, time or thrift account.'"

In our view, the credit extended to the reserve account (that is, the 10% withheld from the purchase price) does not fall within the terms of the statutory definition because it created in both the customer and the bank a right which was only conditional. Whether the customer could utilize this credit depended solely upon performance by the buyer. If the buyer performed his obligation, the purpose for which the so-called deposit was made was accomplished; in that event, the 10% belonged to the customer. On the other hand, in case of default on the part of the buyer, the 10% deposit became that of the bank. As we have noted, this was the purpose of the arrangement between the customer and the bank.

We are unable to discern how it can be held that the credit extended to the reserve account can be characterized as "money or its equivalent received by a bank." It must be certain that the bank received no money from the customer, that it received only the contract which it purchased. Can such a contract be considered as the "equivalent" of money? We think the answer must be in the negative. If the contract be held as the equivalent of cash, we see no reason why the bank should not have paid the customer its face value rather than 90%. It may be that the bank by paying 90% of the face value of the contract recognized it as the equivalent of cash to that extent. By the same token, however, both the bank and the customer recognized the contract to the extent of the 10% withheld as not the equivalent of cash.

Appendix II

Another serious question is whether defendant was obligated to give credit "to a commercial, checking, savings, time or thrift account." Obviously, the last four named forms of accounts are without application. Plaintiff appears to so recognize but argues that the reserve account was a commercial account because it arose out of a commercial transaction. That is a *non sequitur*. We suppose it is true that the account had its genesis in a commercial transaction but it could not be utilized by the customer in the course of trade or commerce.

At the risk of being repetitious, we again point out the absence of liability upon defendant at the inception of a credit to the reserve account. In any event, it is our view that when Congress predicated the assessment base upon the "amount of liability of the bank for deposits," it encompassed only such deposits as imposed upon the bank an unconditional liability and which conferred upon the depositor an absolute right to be paid the amount of his deposit either upon demand or upon such conditions as might be imposed in connection with the deposit. That certainly is true as to the "checking, savings, time or thrift account" enumerated in the statutory definition of "deposit." We see no reason why it should be less true as to the remaining classification, that is, "commercial."

Plaintiff cites and relies heavily upon *Industrial Bank of St. Louis* v. *Federal Deposit Ins. Corp.*, 93 F. Supp. 916, 918 (E.D.Mo.). Defendant attempts, without much success, to distinguish the situation there involved and that here. While the case supports plaintiff's position, we do not agree with either the reasoning or the result. Neither do we agree that *Union Electric Light & Power Co.* v. *Cherokee Nat. Bank of St. Louis et al.*, 94 F. 2d 517, strongly relied upon by the court in the *Industrial Bank* case, is authority for the result reached. In the *Cherokee* case there was a special arrangement between the de-

positor and the bank by which the bank incurred a fixed obligation to pay. The court held there was a special deposit impressed with a trust in favor of the depositor. It is not claimed in the instant case that the reserve account was impressed with a trust under a provision of the statute, which will be referred to under contested issue 4.

CONTESTED ISSUE 4

This issue involves money withheld by defendant from salaries and wages of its employees for the following purposes: (1) payment of federal income taxes on employees' salaries; (2) payment of employees' share of federal social security taxes; (3) payment of employees' contributions to group life insurance premiums, and (4) purchase of government securities for employees. The period involved is from July 1, 1948 through June 30, 1953. The statutory definition of the term "deposit" both in the 1935 and 1950 Acts includes "trust funds held by such bank whether retained or deposited in any department of such bank." While the 1935 Act contained no definition of "trust funds," such a definition was provided in the 1950 Act (Title 12 U.S.C.A. Sec. 1813 (p)), as follows:

> "The term 'trust funds' means funds held by an insured bank in a fiduciary capacity and includes, without being limited to, funds held as trustee, executor, administrator, guardian, or agent."

We think these withholdings were held by the bank as trust funds either with or without the aid of the statutory definition provided in the 1950 Act. By agreement with their employees such funds were held for specified purposes and the bank was under obligation to apply them in accordance with the agreement. But whether trust funds or not, they were deposits within the meaning of the

statute. It is true, as defendant points out, that such funds do not represent cash received from the employees; however, the withholdings were the equivalent of cash. The situation is the same as though he amounts withheld had been paid to the employees and returned by them to the bank to be used by it for the purposes indicated. The point is that the bank incurred a liability for such funds which was absolute, in contrast to a contingent liability as existed under contested issue 3. We agree with the ruling of the district court on this issue.

The judgment is affirmed in part and reversed in part, with directions that it be vacated and a judgment entered in accordance with the views herein expressed. More specifically, the judgment is affirmed as to contested issues 1, 2 and 4, and is reversed as to contested issue 3.

Appendix II

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Tuesday, June 25, 1957

Before: Hon. J. EARL MAJOR, Circuit Judge
Hon. PHILIP J. FINNEGAN, Circuit Judge
Hon. WALTER C. LINDLEY, Circuit Judge

No. 11933

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellant,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellee.

No. 11934

FEDERAL DEPOSIT INSURANCE CORPORATION,
Plaintiff-Appellee,
v.
CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to contested issues 1, 2 and 4, and is REVERSED as to contested issue 3, and that this cause be remanded to the said District Court with directions that the judgment be vacated and a judgment entered in accordance with the views expressed in the opinion of this Court filed this day.

BRARY
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Office - Supreme Court, U.S.
FILED
OCT 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 478

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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INDEX

	PAGE
I—The Question Of Deductibility Of Reciprocal Bank Balances Is Not Academic, And Was Wrongly Decided	1
II—The Double Deduction For Cash Items Whose Collection Respondent Accelerated Raises Questions of Continuing Importance	4
III—Dealer Reserves	6
Conclusion	7

CASES CITED

Merrill v. Fahs, 324 U. S. 308, 313 (1945)	3
Texas & Pacific Ry. Co. v. Pottorf, 291 U. S. 245, 259 (1934)	2
United States v. California, 332 U. S. 19, 39-40 (1947)	4
Wilber National Bank v. United States, 294 U. S. 120, 123-24 (1935)	4

STATUTE CITED

12 U.S.C.A. § 465	3

MISCELLANEOUS

Banking Act of 1935, Hearings before Subcommittee of Senate Committee on Banking and Currency, 74th Cong. 1st Sess. S. 1715, p. 29	2
Banking Act of 1935, Hearings, etc., p. 169	3
F.D.I.C. Ann. Rep., 1950, p. 238; Ann. Rep., 1956, p. 107	3

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FEDERAL DEPOSIT INSURANCE CORPORATION,

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

The question of deductibility of reciprocal bank balances is not academic, and was wrongly decided.

The opinion below would establish a general limitation on deposit assessments, by permitting assessment only of those deposits which are ordinary or "usual". No such limitation is found in the statutory command to pay assessments on "the amount of the liability of the bank for deposits" (Sec. 1817(a); Petn. p. 34). Respondent's "ordinary deposit" theory is one which banks have advanced unsuccessfully in other cases (Petn. pp. 12-13, 29). Such an indefinite standard would be impossible to administer and would encourage further litigation. This Court should clarify the interpretation of the statute by rejecting such a limitation.

Corollary to this "ordinary deposit" theory is the idea that only insured deposits are assessable. The statutory scheme of separate definitions for "deposit" and "insured deposit" (Sec. 1813; Petn. p. 33) should defeat this idea, but respondent's brief repeats it in the statement that "insurance is the *raison d'etre* of the Federal Deposit Insurance Act" (p. 5). Congress deliberately made the assessment base broader than the amount of insured deposits, in order to make sure that large and strong banks like respondent would make an adequate contribution to the stability of the entire banking system.

As Chairman Crowley said at the 1935 Hearings:

> "The benefits of deposit insurance are not limited solely to the protection of the individual depositor. • • • The benefits which will accrue to the large city banks because of greater stability in the country banks, are real and tangible.
>
> "• • • The raising of a sufficient revenue, solely through the laying of premiums against the deposits of those receiving direct insurance benefits, will not be a fair distribution of the burden" (See Banking Act of 1935, Hearings before Subcommittee of Senate Committee on Banking and Currency, 74th Cong., 1st Sess., S. 1715, p. 29).

Respondent attempts to belittle the items in dispute by asserting that petitioner can plead the Statute of Limitations against other banks which have paid the assessment that the Court below has disallowed (p. 4). That the error of a decision is minimized by the Statute of Limitations is not an appealing basis for giving it permanence.

The distinction between loans and deposits in *Texas & Pacific Ry. Co.* v. *Pottorf*, 291 U. S. 245, 259 (1934) (Resp. Br. p. 7), does not justify the assertion made by respondent that a reciprocal deposit is not an indebtedness. Loans

and deposits both constitute "indebtedness". Nor can time deposits be called "relatively minor" (p. 6). They amounted to over 30% of total deposits in both 1950 and 1956. F.D.I.C. Ann. Rep., 1950, page 238; Ann. Rep., 1956, page 107.

The cases which respondent cites on statutes *in pari materia* have no relevance. They apply the principle only to resolve some ambiguity in the statute, which did not exist here; and they apply only to statutes which are more closely related than these. For instance, *Merrill* v. *Fahs*, 324 U. S. 308, 313 (1945), involved *identical language* in the estate tax and gift tax statutes, administered *by the same agency*. Not only is F.D.I.C. separate from the Federal Reserve Banks and the Comptroller of the Currency, but the purposes of regulation by the three agencies differ (Petn. pp. 12-14), and neither of the other statutes contains any definition of deposits. The differences were emphasized by Congress' action in 1950 in separating the Federal Deposit Insurance Act from the Federal Reserve Act.

Moreover, even under the 1950 Federal Deposit Insurance Act only the reciprocal portion of interbank deposits may be deducted for assessment purposes, while the Federal Reserve Act permits deduction of *all* interbank deposits for reserve computation purposes (12 U.S.C.A. § 465). The purpose of permitting this broad deduction under the Federal Reserve Act was to benefit small country banks, which might have moneys due from large city banks, but no sums due to other banks. (See Banking Act of 1935, Hearings cited on preceding page, p. 169.) The decision below reaches the opposite result, by favoring a large bank like respondent.

It is pointless for respondent to cite statistical computations in which F.D.I.C. excluded reciprocal deposits after

1942 (p. 8, n. 7). F.D.I.C. admittedly enforced payment of assessments on reciprocal deposits during that same period. This should not forbid its obtaining statistics to measure other items than assessable deposits. The F.D.I.C. reports have made clear that deposits for reports of condition differ from deposits for assessment purposes. F.D.I.C., Ann. Rep., 1949, pages 57-58.

Finally, respondent misquotes the record when it says that petitioner's witness "repudiated" the charge of concealment (p. 4, n. 3). Clearly, respondent concealed its true position, when it continued not to pay on the bulk of reciprocal deposits but wrote that it was paying an additional assessment "in compliance with" petitioner's demand (J. A. 148). Anderson admitted only that petitioner could have ascertained what respondent was doing, *if a comparison had been made* between the demand and the response (J. A. 106). But the failure of the staff to make that comparison does not estop a government agency like F.D.I.C. from enforcing respondent's statutory liability.

United States v. *California*, 332 U. S. 19, 39-40 (1947);

Wilber National Bank v. *United States*, 294 U. S. 120, 123-24 (1935).

The Petition covers the other assertions of the Brief in Opposition, respecting the need for review of the decision concerning reciprocal balances.

II.

The double deduction for cash items whose collection respondent accelerated raises questions of continuing importance.

1. Respondent asserts that, because of the changes made by petitioner's 1954 Regulations, the issues under this point "are no longer live ones" (p. 2). It fails to

mention that an important feature of the case is not affected at all by the 1954 amendments to the Regulations.

The Court held that the 1950 Regulation was void as inconsistent with the statute, to the extent that it required that items claimed for *double* deduction be both received and forwarded on base days (Petn. p. 46). Respondent incorrectly states that this Regulation was superseded in 1954 (p. 15). The 1954 Regulation still permits double deduction under method (aa) only of items "which were received" on the base day (J. A. 199). If the 1950 Regulation was void, it would follow that the similar 1954 Regulation is void, unless this Court reviews the question.

Respondent leaves unanswered our description (Petn. p. 20) of the temptation that would exist, without this regulation, to manipulate "float" during the period before the base day and thus reduce insurance assessments to the detriment of petitioner and all insured depositors.

The Court committed a startling inconsistency in holding that petitioner *must* broaden the base "day" to cover a three-day weekend, but yet can *not* interpret the statute under its regulatory power, by limiting double deductions to items which were received as well as forwarded on the base day, in order to prevent evasion of the statutory purpose.

The validity of the regulation adopted in 1950 and repeated in 1954, requiring that items deducted as "float" must have been received on the base day, is a very live issue and an important one to petitioner.

Moreover, the general scope of petitioner's rule-making power and the assertion that amendments to its regulations must be retroactive in spite of the express contrary statement by petitioner in the amendatory regulations themselves (J. A. 193), are both live issues as long as petitioner continues to function.

2. The grant of a double deduction for "float" in the 1950 Act was based on the assumption that the average time for collecting such "float" was two days. Respondent accelerated the collection by forwarding items on Friday or Saturday instead of Monday; nothing in the statute entitled it still to claim a double deduction for items which were not in fact "forwarded for collection on the assessment base days" (Petn. p. 34). Denying the double deduction in such circumstances is not penalizing efficiency, as respondent claims (p. 14), but merely conforming to the statutory language and purpose.

Both here and in its statement that it "loses the right to deduct" certain items (p. 11), respondent confuses the two methods provided under the statute. If it uses the (bb) method it can deduct *all* uncollected items; but it cannot deduct *twice* the amount of uncollected items under the (aa) method unless they were forwarded "on the assessment base day".

Judge Birdzell's statement at the 1950 House hearings (Resp. Br., p. 13) does not justify respondent's contentions. Judge Birdzell had left the F.D.I.C. in 1940. He was not the author of the new bill nor a member of the Congress. His colloquial paraphrase of the bill was not directed to the present question and in any event could not alter its wording.

In a statute which permits deduction of twice the amount of uncollected items, any judicial departure from the statute and regulations for computing these deductions is of great importance and merits the consideration of this Court.

III.

Dealer reserves.

With respect to the assessability of dealer reserves, we rest upon our petition.

CONCLUSION

The writ of certiorari should be granted as prayed.

Dated: October 29, 1957.

Respectfully submitted,

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No. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
I. Reciprocal Deposits	3
Facts	3
Argument	4
II. Deductions of Uncollected Cash Items	10
Facts	10
Argument	11
III. The "Contract Reserve" Account	16
Facts	16
Argument	17
Conclusion	18

Citations.

Cases.

Brotherhood of R. R. Trainmen v. C. R. & I. R. Co., 353 U. S. 30, 40 9

Constitution Indemnity Co. v. Shytles, 47 F. 2d 441 (5th Cir. 1931) 9

Grays Harbor National Bank v. Johnson, 151 Wash. 266, 275, P. 697, 699 (1929) 6

Keifer & Keifer v. U. S., 306 U. S. 381, 394 9

Manhattan Co. v. Commissioner, 297 U. S. 129 15

Merrill v. Fahs, 324 U. S. 308, 313 9

McDonald v. Thompson, 305 U. S. 263, 266 6

Texas & Pacific Railway Co. v. Pottorf, 291 U. S. 245, 259 7

U. S. v. Wilson, 168 U. S. 273 4

U. S. Navigation Co. v. Cunard S. S. Co., 284 U. S. 474, 481 9

Statutes.

Federal Deposit Insurance Act of 1935 (49 Stat. 688, 12 U. S. C. A. § 264(c)(12)(h)(1)) 5

Federal Deposit Insurance Act of 1950 (64 Stat. 873, 874, 12 U. S. C. A. 1813(l)) 15

Federal Deposit Insurance Act of 1950 (64 Stat. 873, 876, 12 U. S. C. A. § 1817(a)) 4

Federal Deposit Insurance Act of 1950 (64 Stat. 873, 976, 12 U. S. C. A. § 1817(a)(1)) 2, 12, 14

Federal Deposit Insurance Act of 1950 (64 Stat. 873, 877, 12 U. S. C. A. § 1817(a)(2)) 17

Federal Deposit Insurance Act of 1950 (64 Stat. 873, 878, 12 U. S. C. A. § 1817(g)) 4

Federal Reserve Act of 1913, § 12B as amended, § 12(b) (48 Stat. 162, 168, 169) 8

Federal Reserve Act of 1913, § 12B as amended by the Banking Act of 1935 (49 Stat. 684, 688) 5

Federal Reserve Act of 1913, § 19, as amended (49 Stat. 684, 714, 12 U. S. C. A. 465) 3

Miscellaneous.

FDIC 1934 Annual Report, p. 144 7

FDIC 1942 Annual Report, pp. 80, 81 7

FDIC 1951 Annual Report, p. 141 8

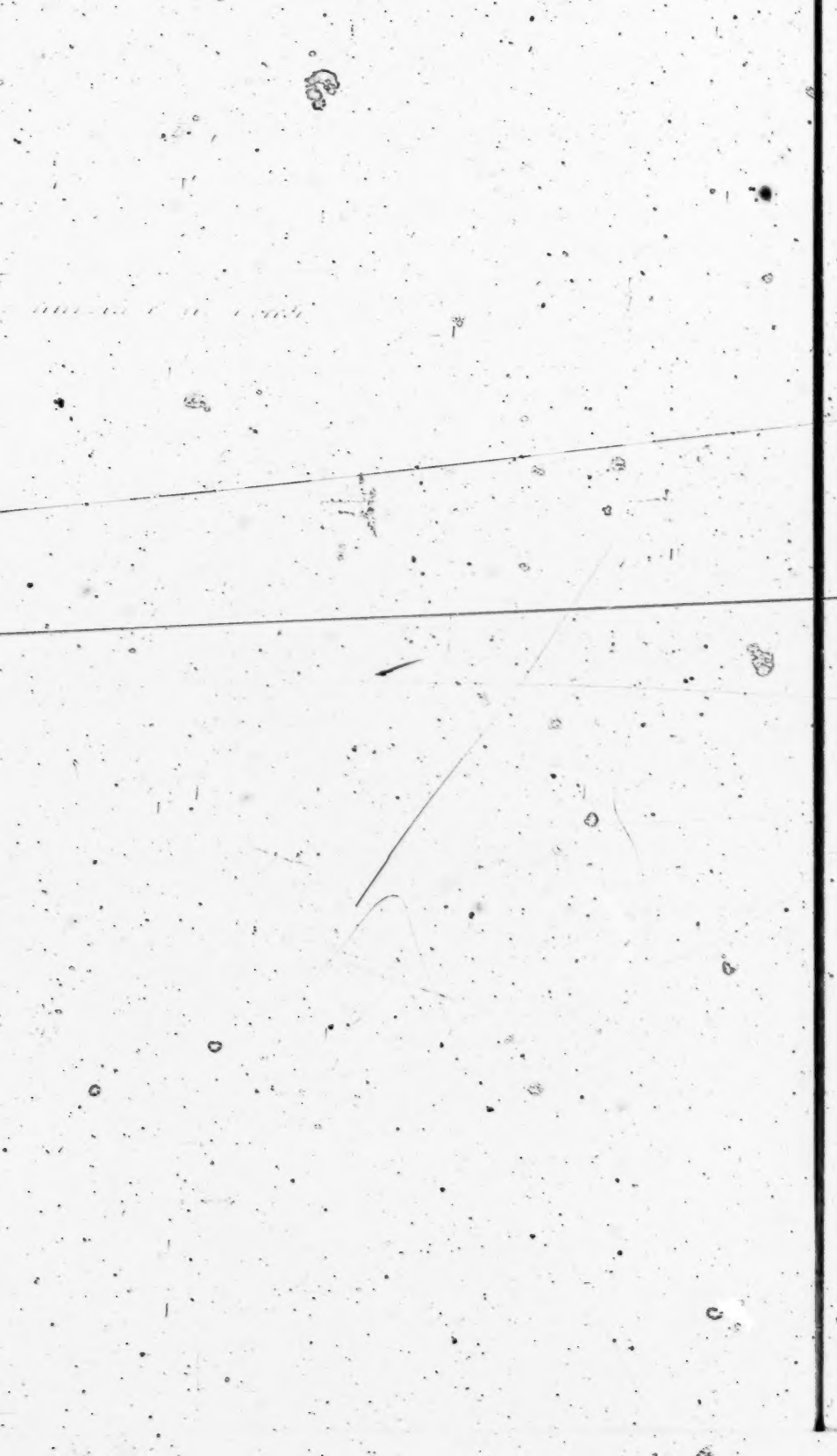
73 Banking L. J. 701, 704 (1956) 14

FDIC 1950 Regulation, §§ 327.1, 2 15

FDIC 1954 Regulations, Sections 327.1(a), 327.1(f), 12 C. F. R. §§ 327.1(a), 327.1(f) (Supp. 1955) 11, 13-14

1950 House Hearings on S 2822, 81st Cong. 2d Sess. 13

Zollman, Banks & Banking, § 4433, § 4633 (1936) 7



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BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 245 F. 2d 567. The memorandum opinion of the District Court is unreported, and is printed in the Joint Appendix on which the case was heard in the Court of Appeals (J. A. 163-4).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED.

The statutes involved are adequately set forth in the Appendix to the petition.

QUESTIONS PRESENTED.

1. In computing assessments for the years 1948 to 1950 was the respondent Bank entitled to reduce the amount of deposits of other banks in respondent by the amount of the balances in the reciprocal deposit accounts which respondent maintained with those banks?

The amount of additional assessments which petitioner (herein sometimes referred to as FDIC) claims under this item is $24,755.42. Under the Federal Deposit Insurance Act of 1950, which is now in force, there is no doubt as to respondent's right to make these deductions (12 USCA, § 1817(a)(1)). The question is, therefore, now academic.

2. In computing the statutory deduction for uncollected cash items for the years 1950 to 1952, was respondent entitled to deduct twice the amount of uncollected items credited on the base day, but not received and forwarded on the calendar base day?

This item involves a total of $64,590.77, which petitioner seeks by way of additional assessments. The issues involved in this controversy are no longer live ones, inasmuch as under the 1954 Regulations promulgated by FDIC, the validity of respondent's deductions is expressly recognized.

3. Did the amount of credits arising under "contract reserve" accounts constitute deposits under the 1935 Act?

Under this item petitioner seeks to recover from respondent additional assessments of $2,442.52 for the years 1948 to 1950. This controversy cannot arise under the

1950 statute now in force, and this question is also, therefore, academic.

The facts and arguments as to each point will be stated separately.

I.

Reciprocal Deposits.

Facts.

Respondent bank had reciprocal deposit accounts with some 26 banks (J. A. 13); that is, in each of these instances respondent bank had deposits with another bank and the other bank maintained deposits with respondent bank. For example, if Bank A had a deposit account in Continental of $250.00 and Continental had a deposit balance in Bank A of $100.00, Continental would include only the difference in its deposit liabilities for assessment purposes namely, $150.00. FDIC claims that the entire $250.00 should be counted.

Respondent's position is supported by the directive from the Federal Reserve Bank:[1] "that reciprocal interbank demand balances * * * hereafter are to be reported Net instead of Gross", and the instructions of the Comptroller of the Currency[2], each of which requires only the net balance in such situations to be counted.

1. Circular No. 1087, July 1, 1942, J. A. 162-3; cf. Federal Reserve Act of 1913, § 19, as amended 49 Stat. 684, 714, 12 U. S. C. A. § 465.

2. The Comptroller of the Currency issued written instructions to banks in June, 1942 which required banks to report reciprocal accounts on a net basis (J. A. 162).

Argument.

1. Although there is a dispute between the parties as to whether respondent owes the FDIC $24,755.42 for the years 1948, 1949 and 1950,[3] it is not disputed that after 1950 assessments should be based only on the net balance of reciprocal deposits, as the Act of 1950 provides expressly that banks are authorized to deduct "from the deposit balance due to an insured bank the deposit balance due from such insured bank * * * which is subject to immediate withdrawal" (12 USCA §1817(a)).

The petitioner implies that an enormous amount is involved because in 1950 the aggregate volume of reciprocal bank deposits totaled $670,000,000 (Pet. p. 11). But no such amount can be affected by this case. Even for 1950 only the amount of the assessments, that is 1/12 of 1% of that sum, or at most $558,333.33 could have been claimed from all banks, if petitioner is correct in its view of the law. Out of 13,600 insured banks only forty other banks originally took the same position as respondent, but all subsequently paid the assessments demanded by the FDIC, with only two paying under protest (J. A. 71, 125).[4] Since these were payments voluntarily made they cannot be recovered. *United States* v. *Wilson*, 168 U. S. 273.

Furthermore, by now the 5 year Statute of Limitations (12 U. S. C. A. § 1817 (g)) would have expired on any suits not yet brought. The decision below can, therefore,

3. It is to be noted that although petitioner concedes that defendant has been making this deduction since 1937, it did not bring suit until 1954. Its intimation (Pet. p. 5) that respondent was concealing what it was doing is repudiated by its own witness (J. A. 106), and disproved by the correspondence (J. A. 148-149).

4. "This [FDIC's] interpretation was acquiesced in by all insured banks except two. Those two paid their assessments on reciprocal bank accounts under protest." (Petitioner's Opening Brief in Court of Appeals, page 32).

affect no other case but this one, which involves only $24,755.42, and perhaps disputes with the two other banks which paid under protest.

2. On the merits, the issue turns upon the meaning of the phrases, "usual course of business" and "indebtedness" in § 264 (c) (12) (h) (1) of the 1935 Federal Deposit Insurance Act (49 Stat. 688), which was, as we have seen, superseded in 1950. The 1935 Act provided that assessments should be based on the "total amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph 12, subsection (c) of this section without any deduction for indebtedness of depositors) * * *." Subsection (c) of paragraph 12 provided that deposit meant "the unpaid balance of money or its equivalent received by a bank in the usual course of business. * * *"[5]

(a) Reciprocal deposits are not received "in the usual course of business". As the court below declared, "reciprocal deposits are for the convenience of the banks involved and their customers. They add nothing to the earnings of either bank except the bank which holds a net balance." "It is the ordinary and usual deposits of a bank which measure its strength, its growth and development" (Pet. App. p. 41). Only 300 to 400 of the 13,600 insured banks in the country carry reciprocal accounts. (Pet. App. 42) Since, in the case of reciprocal deposits, one offsets the other, there is no reason why more than the net balance need be insured; insurance is the *raison d'etre* of the Federal Deposit Insurance Act. For these reasons, Congress, confirming the pre-existing banking practices, made it clear in 1950 that reciprocal deposits should not be included in the assessment base.

It is important to note that the statutory language (49

5. The statutory provisions are quoted in full on pp. 32-33 of the Petition.

Stat. 688) on which assessments are based was and still is "liability for deposits", not merely "deposits". Since a bank is only liable to the bank with which it has a reciprocal account for the net amount, it is clear that the respondent properly deducted the amount of reciprocal accounts in computing the basis for assessments.

As stated in *Grays Harbor National Bank* v. *Johnson*, 151 Wash. 266, 275 P. 697, 699 (1929), in considering reciprocal accounts between banks, one of which was in receivership:

> "This results in the one having the least total credits against the other being entitled to set off such total credits against the total credits of the other, and to have the balance only regarded as owing from one to the other. * * *"

(b) Petitioner relies upon the fact that the statutory provision stated that there should not be "any deduction for indebtedness of depositors." The word "indebtedness" undoubtedly was meant to refer to the usual situation of a depositor who borrows money from a bank.

The term "indebtedness", which is not used elsewhere in the Act, must be differentiated from the term "deposit", which is used frequently, in accordance with the well settled canon of statutory construction that each word should be given a distinct meaning. (*McDonald* v. *Thompson*, 305 U. S. 263, 266). Although deposits from banks in which an offsetting amount is deposited are deposits and obligations, they would not normally be thought of as "indebtedness".

Banks find it necessary further to distinguish between their own deposit liabilities and *indebtedness* of depositors to them. Deposits must be kept available to bank customers according to the deposit contract, and deposits, except for a relatively minor volume of time deposits, are

payable on demand. On the other hand, many loans are time loans and it is generally held that no right exists in behalf of the bank (except in cases of insolvency) to offset deposits of customers against indebtedness which is not yet due and payable (*7 Zollman, Banks and Banking*, § 4433 (1936)). Therefore, the relation of a bank to its ordinary customers is generally not one of mutual debits and credits as in the case of reciprocal bank accounts. A further difference between offsetting reciprocal bank deposits and offsetting indebtedness of borrowers against deposits is that banks are required to offset reciprocal deposits and thus avoid inflating the amount of their true deposit liability, but the offsetting of the indebtedness of a borrower, if the right should be a present one, is a matter of election by the bank because it may have other collateral or other reasons for not exercising its right of offset (*7 Zollman, Banks and Banking*, § 4633).

This Court has recognized the distinction between loans and deposits. (*Texas & Pacific Railway Company* v. *Pottorf*, 291 U. S. 245, 259.)

FDIC at an early stage recognized that deposits by banks were in a separate category from those of other depositors. Its 1934 Annual Report, p. 144, contains instructions, which state, *inter alia*:

> "Deposits of banks, bankers and trust companies must be reported separately from deposits of other depositors."

Petitioner (p. 15) cites its 1942 Annual Report in which it quotes briefly from Chairman Crowley's testimony before the Senate Committee on Banking and Currency. The petition states that the FDIC stated that it was "assessing interbank deposits." Petitioner fails to point out that on pages 80 and 81 of the same report, it is indicated that the reciprocal amounts were not included in the

amount of the interbank deposits as reported for 1942, but were tabulated separately.[6]

This suit involves reciprocal accounts—not interbank deposits generally. The portions of the report referred to with the statistical data supporting it show that FDIC's own statisticians and board of directors have actually followed the action of the Federal Reserve Board and the Comptroller in 1942 in determining for each insured bank the "liability of the bank for deposits" by excluding reciprocal accounts[7] (FDIC 1942 Annual Report pp. 8-9 and pp. 80-1).

3. Petitioner attempts (Pet. p. 13) to create an issue of importance out of the remark of the court below that:

> "The Federal Reserve Bank, like plaintiff, was an agency of the Federal Reserve System" (Pet. App. p. 43).

Whether or not FDIC is an "agency" of the Federal Reserve System, there is plainly a close relationship. The Federal Deposit Insurance Act was originally a part of the Federal Reserve Act Sec. 12 B (48 Stat. 168). The Federal Reserve Banks were required to and did furnish nearly one-half of the original capital of the FDIC (48 Stat. 169). And the Comptroller of the Currency is one of the three members of the Board governing the FDIC (48 Stat. 168). The court below was merely saying that the practices of these other agencies operating in the same field were relevant in construing the Federal Deposit Insurance Act. This dictum can hardly have the horrendous

6. Beginning in 1942 "interbank deposits" was used to characterize ordinary deposits by one bank with another, but excluding reciprocal amounts from both deposits on the liability side and from the cash balances with other banks on the asset side.

7. "Since June 30, 1942, demand balances with and demand deposits due to banks in the United States, except private banks, and American branches of foreign banks, exclude reciprocal interbank deposits." (FDIC 1951 Ann. Report, p. 141.)

consequences which petitioner suggests or create an important federal question.

Likewise in the instant case it is necessary to consider the Federal Deposit Insurance Act in its full legislative setting and in the light of the action taken by the Comptroller and by the Federal Reserve Board. Petitioner insists, however, that such action is not at all pertinent and not binding on it. In so doing, it overlooks the well-settled rule of statutory construction that other statutes dealing with the same subject matter are in *pari materia*, and that, therefore, the Federal Deposit Insurance Act must be construed together with other federal legislation dealing with banks. (*Merrill* v. *Fahs*, 324 U. S. 308, 313; *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, 481; *Brotherhood of R. R. Trainmen* v. *C. R. & I. R. Co.*, 353 U. S. 30, 40.)

It would seem absurd to require respondent in computing its deposit liabilities as directed by the Comptroller of the Currency and in compliance with the Federal Reserve directives to use one method and in computing its liability for deposits for the purpose of fixing the assessment base to use another. To do so would "impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none." *Keifer & Keifer* v. *U. S.*, 306 U. S. 381, 394.

4. It is also argued (Pet. 11) that the decision of the 5th Circuit in *Constitution Indemnity Co.* v. *Shytles*, 47 F. 2d 441 (1931) conflicts in principle with the decision below. That was a decision construing a Workmen's Compensation Insurance policy, and has nothing to do with the present problem.

II.

Deductions of Uncollected Cash Items.

Facts.

FDIC seeks to recover approximately $64,000 as an additional assessment based on the inclusion of uncollected cash items which the respondent deducted from the deposits which constituted the assessment base. Under the 1950 Act, the assessments are based on the average of the assessment base for the days March 31, June 30, September 30 and December 31 (U. S. C. A. § 1817(2), Pet. App. pp. 35-6). The controversy relates to the method of computing the deductions for "float" items, the uncollected checks on out-of-town banks, when the base days fall on Monday.

Most banks are closed on weekends, so that as to them the "float" problem on a Monday base day is no different from that on any other. But respondent has so large an amount of weekend "float" items that it maintains a staff to start the processing of such items between the close of business Fridays and the opening of business Mondays (J. A. 17). Many of the items were received after the close of business on the preceding Friday, were forwarded for collection on Saturday or Sunday (although the bank was officially closed on those days), preceding the Monday base day but remained uncollected on Monday, when they were credited conditionally (J. A. 17). A second category was received after the close of business on the Friday preceding the Monday base calendar day, credited conditionally on the base day, and forwarded for collection on that day (J. A. 18). The items in the remaining category were received and credited conditionally on the base day, but were not completely processed and forwarded until the next day (J. A. 18) because of the enormous number of items handled by respondent (J. A. 110-11).

If the respondent had permitted the "float" items to accumulate from Friday to Monday before forwarding them for collection, as do most banks, there would be no question as to their deductibility. As a matter of fact petitioner received at least $84,000 more by way of assessments from respondent than petitioner would have received had respondent waited until the Monday base days to forward the items. The sum which was paid to petitioner in open court by respondent (J. A. 60) represented items forwarded over the week-ends which had been collected by the base days. The question is whether respondent loses the right to deduct the first two categories of items because it forwards them over the weekend, though they are still uncollected on Monday, and whether it loses the right to deduct the third category of items which were credited on the base days but not completely processed or forwarded until the following day.

Argument.

1. By its regulations effective March 30, 1954, FDIC has construed "base day" as being "the period of time beginning with the time of the closing of the books of the bank on the last business day immediately preceding the assessment base day to the time of the closing of the books of the bank on the base day according to the normal practice of the bank. Holidays and other nonbusiness days intervening between the preceding business day and the base day are a part of the base day". Items are deemed to have been forwarded when they are "in the process of forwarding in accordance with normal procedure of the bank, even though the item may be in the possession of the bank at the time of the closing of the books on the base day" (Sections 327.1(a), and 327.1(f) 12 C. F. R. §§ 327.1(a), 327.1(f) (Supp. 1955) quoted in Pet. App. 47). Concededly, re-

spondent's deductions are in accordance with this interpretation of the Act, which no one questions. The issue thus relates to assessments for the period between 1950 and 1954, for FDIC is not attempting to assess these items for subsequent years. The proper interpretation of the Act before 1954 is, therefore, of no present general importance.

FDIC attempts to give the impression that the decision below might affect all of the $193,000,000,000 of insured deposits at the end of 1954 (Pet. p. 27). Obviously, only a minute portion of this total would ever have fitted into the narrow pattern of facts described above.

Moreover, unless others have not paid the amounts claimed, or have paid them under protest, they will not be entitled to rely upon the decision below. Counsel for petitioner stated on the record there were only ten banks which paid under protest and two which posted security but did not pay (J. A. 125). In its opening brief in the Court of Appeals, petitioner stated (pp. 11-12):

> "From the date of promulgation of the 1950 Regulation down to March 31, 1954, the date of its amendment, all insured banks throughout the country, except two banks which deposited security and asked that payment be deferred, have complied with the plaintiff's regulation and have deducted from deposits in figuring their assessment bases only uncollected cash items received and forwarded on the base day. (J. A. 80, 125.)"

Furthermore, the 5-year statute of limitations would bar suits for all but the base days between October 1952 and March 1954.

2. The 1950 Act gives a bank two options for deducting the so-called "float" items (12 USCA, § 1817(a)(1); Pet. App. p. 34). Respondent chose the "aa" method, which reads:

> "By multiplying by two the total of the cash items forwarded for collection on the assessment base days

(being the days on which the average deposits are computed) and cash items held for clearings at the close of business on said days, which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts."

Since the object of this deduction is to avoid charging the banks for items not collected, it is reasonable to construe the phrase "forwarded for collection" as covering items in the process of being forwarded on the day in question.

This is fully supported by the testimony given by Judge L. E. Birdzell, who had formerly been counsel for FDIC, when he stated that (1950 House Hearings on S. 2822, 81st Cong., 2d Sess., p. 112):

"* * * This bill simplifies that procedure by giving the banks an option to take a deduction from the assessment base of twice the amount of the cash items held for clearance or *forwarded for collection at the close of the business days* on which the deposit liabilities are computed for assessment purposes." (Italics ours.)

The fact that Judge Birdzell spoke of items "forwarded for collection at the close of the business days" clearly indicates his interpretation of the word "forwarded" as being used in the sense we urge; otherwise the words "at the close of the business days" would not make sense. His statement cannot be interpreted as construing this provision to require the actual forwarding of the items at the close of the business days. He was, therefore, obviously referring, as we do, to items in the status of having been forwarded or in the process of being forwarded.

To adopt the literal interpretation urged by petitioner would frustrate the intention of Congress to provide a simplified and fair method for the computation of assessments and to exclude uncollected items in determining the assess-

ment base. It is elementary, however, that courts are required to promote and give effect to the fullest reasonable extent, to the spirit of a statute even though contrary to its strict letter.

As the Court of Appeals said (Pet. App. 48):

> "If defendant had permitted the accumulation of all cash items between the time it closed its bank for business purposes on Friday until it opened on Monday (a base day) and had forwarded such items on that day, there could be no question as to their deductibility. To hold that they are not deductible because the bank, in keeping with efficiency and sound banking practices, maintained a force for the purpose of forwarding such items on Saturday and Sunday, is barren of any logic, as plaintiff's 1954 regulation appears to recognize."

Petitioner should not be allowed to penalize respondent for rendering prompt and efficient service to its customers. To accept the narrow view of base day and limit it to calendar day as suggested by petitioner would discourage efficient banking procedure.[8]

Petitioner argues that because the "aa" method allows a bank to double the amount of "float" items on the base day, it is improper to allow respondent to go beyond the base day strictly construed. It is urged that if respondent wished to deduct these items, it should have used the "bb" method.[9] Under the "aa" method banks are allowed to

8. This was in effect conceded by petitioner's chief witness, A. E. Anderson, FDIC Fiscal Agent, when he admitted in a speech in May 1956 that this construction under which the respective calendar days "from midnight to midnight constituted the base days" "brought about certain difficulties, which was unfortunate as this Amendatory Act was designed for simplification." 73 Banking L.J. 701, 705 (1956).

9. "By deducting the total of cash items forwarded for collection on the assessment base days and cash items held for clearings on the close of business on said days which are in the process of collection and which the bank has paid in the regular course of business or credited to deposit accounts plus uncollected items paid or credited on preceding days which are in the process of collection * * *." (12 U. S. C. A § 1817(a) (1).)

double the outstanding collection items on the theory that the average item is outstanding for collection for at least two bank days (J. A. 79). The "bb" method authorized the single deduction of items forwarded for collection on the base day and outstanding items paid or *credited on preceding days* (J. A. 17). Inasmuch as all of the items in question were credited on the calendar base day, they could not have been deducted under the "bb" method as they were not credited on preceding days.

If petitioner's interpretation is correct, respondent would be compelled to pay assessments, based on uncollected items which could not be drawn against, and were, therefore, not "money or its equivalent" as required by the statute (12 U. S. C. A. § 1813(l)).

Petitioner's original regulation in 1950 (§§ 327.1, 2) provided that items deducted under the "aa" method must be both received and forwarded on the base day (J. A. 181-184). The statute just says "forwarded," and nothing authorized the petitioner to add the requirement that the items also be received on that day. But that regulation was superseded in 1954, and its validity obviously does not present an issue important enough for this Court to review.

Petitioner contends that the court below gave the 1954 regulation retroactive effect, contrary to the intent of the FDIC. The court denied having done this (Pet. App. p. 48). It merely agreed that the construction of the statute embodied in the 1954 regulation was the correct one, and that the statute therefore had that meaning *ab initio* and said "If plaintiff had the authority in 1954 to interpret the statute as it did, we think a court has the authority to place a like interpretation upon the statute during the period from 1950 to 1954" (Pet. App. p. 48). The court was thus not giving effect to the regulation retroactively, but interpreting the statute for itself. As stated in *Manhattan Co. v. Commissioner*, 297 U. S. 129, relied on by the court

below (Pet. App. p. 48), "It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand."

We submit that this interpretation is fair and reasonable, and that since it was adopted by petitioner in its own 1954 Regulations, it affords no ground for review.

III.

The "Contract Reserve" Account.

Facts.

Respondent and certain of its customers entered into agreements (J. A. 19) whereby respondent bought conditional sales contracts, which the customer had received for goods sold by it. The Bank paid its customer 90% of the face amount of the contracts. The customer made certain warranties with respect to its merchandise and the contracts and also assigned to the Bank, as security, title to the merchandise which the customer had retained. The customer was to collect the contracts as agent for the Bank. The remaining 10% of the amount due on the contracts was treated by the parties as a contract reserve and set up on the Bank's books as a liability. The 10% reserve was a further security to the Bank in the event the contracts proved uncollectible. The reserve was to be maintained at a certain level either out of the proceeds of further contracts to be purchased by the Bank or by retaining collections. Although the word "deposit" was used in the contract between the Bank and its customers, since the reserve was held as security no withdrawals were permitted and none was attempted to be made (J. A. 117-19).

Argument.

1. Up to 1950 there was no express statutory provision covering this point. In 1950 the statute was amended so as to permit banks to exclude from the assessment base, "cash funds which are received and held solely for the purpose of securing a liability to the Bank but not in an amount in excess of such liability" (12 U. S. C. A., § 1817(a)(2)(ii)). Petitioner concedes (p. 30) that the deduction here in issue is authorized by this amendment, but claims that respondent owes $2,442.52 for the years 1948, 1949 and 1950. This question also is plainly academic and of no present importance. It is not asserted that there is any pending litigation or any claim relating to this issue. Moreover, the Statute of Limitations would bar any such claims.

2. The court below properly held that these so-called "deposits" were not deposits in the "usual" sense and therefore did not form the basis for assessments. What the Bank received was uncollected paper or contracts, not "money or its equivalent," as provided in the Act. The customer could not withdraw the so-called deposit unless all the paper or contracts had been paid in full.

Conclusion.

All of the questions presented have become and are now purely academic by reason of amendments to the statute or the adoption of new regulations. There are no important questions of law involved, and the court below correctly decided all of the issues. We, therefore, respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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